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The Madras Law Journal Reports.

PART I.] JULY 1915. [VOL. XXIX.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

[FULL BENCH.]

Present:—Sir John Wallis, Chief Justice, Mr. Justice Seshagiri Aiyar, and Mr. Justice Kumarasami Sastri.

Rajah Sahib Meharban T. Dostam Sri Rajah Row Venkata Kurma Mahipati Surya Row Bahadur Garu, Sirdar Rajamundry Circar and Rajah of Pittapur.	*Appellant* in both. (Appellant in S. A. Nos. 323 and 433 of 1912 on the file of the High Court).*
v.	
Gani Venkata Subba Row and others.	*Respondents in L. P. Appeal No. 129 of 1913. (Respondents in S. A. No. 323 of 1912 on the file of the High Court).*
v.	
Maddikonda Buchiraju ...	*Respondent in L. P. Appeal No. 130 of 1913. (Respondent in S. A. No. 433 of 1912 on the file of the High Court).*

Rajah of Pittapur *v.* Gani Venkata Subba Row.

Madras Estates Land Act, Ss. 210 and 211—Limitation Act of 1877, S. 7—Suit for arrears of rent for faslies which expired more than three years prior to the coming into force of the Act—Limitation—Minority if a ground for exemption—Statutes of limitation—Retrospective operation, when—General Clauses Act, S. 6, cl. (e)—Madras Act I of 1891, *S.* 8, *cl.* (*e*).

Where after the coming into force of the Madras Estates Land Act a Zamindar brought a suit for arrears of rent for faslies which expired more than three years before the Act but within three years of his attaining majority: *Held* (per *Wallis C. J. and Kumaraswami Sastri J., Seshagiri Iyer, J. contra*) that S. 211 of the Madras Estates Land Act had no retrospective operation so as to extinguish causes of action that were alive at the passing of the Act and that the suit was not barred by limitation.

* L. P. A. Nos. 129 and 130 of 1913. 1st April 1915.

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Per Wallis, C. J.—The principle, which has received legislative recognition in S. 8, cl. (e) of the Madras General Clauses Act, is that where an Act contains provisions for the limitation of suits which take away altogether a vested right of suit without providing any equivalent remedy, then, the provisions must be considered to have been enacted subject to the implied exception that they are not to extend to such vested rights of suit which are to continue subject to the rules of limitation in force at the passing of the Act.

Per Kumaraswami Sastri, J.—Though laws affecting limitation might abridge or enlarge periods of limitation in cases of suits or causes of action which are alive at the date when the new enactment comes into force and which under the old law would expire afterwards, the change cannot, unless there is a clearly expressed intention to the contrary either by apt words in the enactment or otherwise, operate retrospectively so as to destroy rights of suits which are alive on the date.

Reid v. *Reid* [1], *Colonial Sugar Refining Co.* v. *Irving* [2], *Gopeswar Pal* v. *Jiban Chandra* [3], Referred to. *Ramakrishna Chetty* v. *Subbaraya Aiyar* [4] approved.

Appeals under Clause 15 of the Letters Patent against the judgment of Sankaran Nair and Sadasiva Aiyar JJ. in S. A. Nos. 323 and 433 of 1912, preferred against the decree of the District Court of Godavari in A. S. Nos. 111 and 79 of 1910, preferred against the decrees of the Court of the Suits Deputy Collector of Godavari in Summary Suits Nos. 128 and 18 of 1910 respectively.

The facts are fully set forth in Mr. Justice Kumaraswami Sastri's Judgment.

B. Somayya for *P. Narayanamurti* for Appellant in both appeals.

B. Narasimha Rao for Respondents in L. P. A. No. 129 of 1913.

V. Ramdoss for Respondent in L. P. A. No. 130 of 1913.

B. Somayya :—A suit for the recovery of arrears of rent is brought under S. 77 of the Estates Land Act. The period of limitation applicable to the suit is prescribed by Schedule A, Art. No. 8 of the Act. S. 211 of the Act enacts that the provisions of S. 7 of the Limitation Act are inapplicable to suits under the Estates Land Act.

[*The Chief Justice* :—You do not contend that after the passing of the Estates Land Act you could have instituted your suit in the Civil Court.]

So far as the forum is concerned, S. 189 of the Act limits me to the Revenue Court. But my right to recover arrears accrued before the Act is not so limited. The provisions of Ss. 210 and 211 of the Act ought not to be applied to suits in which the

1. (1886) L. R. 31 Ch. D. 402.
2. (1905) A. C. 369.
3. (1914) I. L. R. 41 C. 1125.
4. (1912) 24 M. L. J. 54.

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right of the party accrued before the Act and which, if the Act is applied, would be barred even before the passing thereof. In *Ramakrishna Chetty* v. *Subbaraya Aiyar* [1], the distinction between the two cases is stated.

[*Seshagiri Iyer, J.* :—The case reported in *Ramakrishna Chetty* v. *Subbaraya Aiyar* [1], was not one in which an express provision of the Limitation Act was excluded by the Estates Act. In our case, S. 211 of the Act specifically provides that S. 7 of the Limitation Act is inapplicable to suits under S. 77 of the Estates Act.]

The point is not whether any provision of the Estates Land Act expressly excludes any provision of the Limitation Act. I rely upon *Ramakrishna Chetty* v. *Subbaraya Aiyar* [1], for the position that if by applying the provision of the Estates Land Act a manifest and irremediable hardship will be caused to a party possessing a right, it will not be applied and the suit will be held to be governed by the old law. The case of *Soni Ram* v. *Kanhaiya Lal* [2], was a case of shortening of the period of limitation and not one of extinguishing the right altogether. The plaintiff in that case had ample time even after the New Act was passed within which he could have instituted the suit. See also the cases of *Munjoori Bibi* v. *Akhal Mahomed* [3], *Budhu Koer* v. *Hafiz Husain* [4], *Gopeswar Pal* v. *Jiban Chandra* [5], and *Delhi and London Bank* v. *Orchard* [6].

[*Seshagiri Iyer, J.*:—Was S. 7 of the Limitation Act applicable to suits for the recovery of rent brought while the Rent Recovery Act was in force ?]

It was applicable to a suit brought under the general law and in the Civil Court. It was not applicable to a suit brought under the Summary provisions of the Rent Recovery Act and in the Revenue Courts. See the case of *K. A. Nayanim Bahadur* v. *Sithala Naidu* [7], which was a summary suit.

B. Narasimha Rao for Respondents in L. P. A. 129 :—

In the case before your Lordships, the Act has not taken away the right itself. It has merely taken away a ground of exemption available to the party before it was passed. In such a case the Act may be given a retrospective operation. Further there is in this case no room for the application of the principle of interpretation enunciated by the cases referred to on the other

1. (1912) 24 M.L.J. 54 (57). 2. (1913) I.L.R. 35 A. 227 (P.C.)
3. (1912) 17 C. L. J. 316. 4. (1913) 18 C. L. J. 274.
5. (1914) 19 C.L.J. 549 (562). 6. (1877) L.R. 4 I.A. 127, s.c. I.L.R 3 C. 47 (P.C.)
7. (1897) I. L. R. 20 M. 476.

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side, because the legislature has clearly indicated its intention in S. 211 of the Estates Land Act.

V. Ramdoss for Respondent in L. P. A. 130. The opinion of *Abdur Rahim, J.* in the case of *Sundaramiyah* v. *Muthu Ganapathegal* 1, is against the contention of the appellant. There may be some principle in the contention that whenever the cause of action arose before the Act, it ought not to be applied But that is not the contention of the appellant. My submission is that even if a party has only one day after the passing of the new act on which he can sue, the new act must be applied *Munjoori Bibi* v. *Akhal Mahomed* 2, was a case one falling within a provision corresponding to S. 210 of the Estates Land Act. It was not a case of a minor. *Fazl Karim* v. *Annanda Mohan Roy* 3, was the case of a minor and supports my contention.

The fact that the New Act provides for a period of grace is material only in regard to the intention of the Legislature. It is not conclusive against the retrospective applicability of the new act. In the present case, there was a period of grace, *viz.*, 3 days, and there is an express provision against the applicability of S. 7 of the Limitation Act, thereby showing the intention of the Legislature. See *Arayil Kali Amma* v. *Sankaran Nambudripad* 4. Even in our case, the Governor's assent was given in March 1908 and then it was published in the Gazette that it would come into force only in July 1908.

[*Seshagiri Aiyar, J.*—Is there any authority for the position that when in an act newly passed there is a provision that it shall come into force only after a certain interval, then notice is thereby given to parties having rights, though the formality of the assent of the Governor-General is taken afterwards ?]

See *Chidambaram Chetty* v. *Karuppan Chetty* 5, and *Hope Mills* v. *Vithaldas* 6.

The Court delivered the following

Judgments:—*The Chief Justice.*—I think that Sadasiva Aiyar, J. was right in following the carefully considered judgment of Benson and Sundara Aiyar JJ. in *Ramakrishna Chetty* v. *Subbaraya Aiyar* 7, and that the principle to be applied is that where an Act

1. (1912) M.W.N. 652 (653). 2. (1912) 17 C.L.J. 316.
3. (1911) 15 C.W.N. 845. 4. (1910) I. L. R. 31 M. 292 s.c. 20 M.L.J. 347
5. (1910) 9 M.L.T. 75. 6. (1910) 12 Bom. L. R. 780.
7. (1912) 24 M. L. J. 54.

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contains provisions for the limitation of suits which take away altogether a vested right of suit without providing any equivalent remedy, then according to the approved rule of construction, the provisions must be considered to have been enacted subject to the implied exception that they were not to extend to such vested rights of suit which were to continue subject to the rules of limitation in force at the passing of the Act. This rule of construction was adopted to give effect to the presumed intention of the legislature not to take away vested rights in this fashion; it is recognised in section 8 of the Madras General Clauses Act, 1890, and the provisions now in question must be taken to have been enacted with reference to it. In *Ramakrishna Chetty* v. *Subbaraya Aiyar* [1], it was held with reference to this Act that the six years period applicable under Art. 116 to a registered contract continued to apply to a suit for rent under the Madras Landed Estates Act which would otherwise have become barred by the coming into force of that Act at a time when the period of limitation prescribed by it for suits of this nature had already expired. In the present case the claim for rent was not barred at the date of the passing of the Act as it was kept alive under section 7 of the Limitation Act owing to the minority of the plaintiff. Ss. 210 and 211 enact rules of limitation for suits under the Act, and S. 211 expressly provides that section 7 and certain other sections of the Limitation Act shall not apply to suits under this Act. Thus the result of the passing of the Act, which came into force two days after it received the Viceroy's assent, was to leave no opportunity for the exercise of the plaintiff's vested right of suit unless the provisions of S. 211 (1) be read subject to an implied exception in cases where these provisions would otherwise absolutely destroy the plaintiff's right of suit which was in existence when the Act came into force. In addition to the cases cited in that judgment I may refer to the recent decision of a Full Bench of five Judges of the Calcutta High Court, *Gopeswar Pal* v. *Jiban Chandra* [2] where Jenkins C. J. delivering the judgment of the Court after citing *Commissioner of Public Works (Cape Colony)* v. *Logan* [3] and *Colonial Sugar Refining Co.* v. *Irving* [4] and *Jackson* v. *Woolley* [5] observed "Here the plaintiff at the time

1. (1912) 24 M. L. J. 54.
2. (1914) I. L. R. 41 C. 1125.
3. (1903) A. C. 355.
4. (1905) A. C. 569.
5. (1858) 8 E. and B. 764 at p. 778 s. c, 120 E. R. 289.

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when the Amending Act was passed had a vested right of suit; and we see nothing in the Act as amended that demands a construction that the plaintiff was thereby deprived of a right of suit vested in him at the date of the passing of the Amending Act".

These observations are applicable to the present case and I think the appeal must be allowed, the decrees of the Lower Appellate Court be reversed, and the case remanded for disposal according to law. The respondents will pay the appellants' costs of the appeal. Other costs will abide and follow the event.

Seshagiri Aiyar J.—With the greatest reluctance, I have ventured to differ from the conclusion at which the learned Chief Justice has arrived.

The circumstances which raise the question of law are these: Before the passing of the Estates Land Act, suits for arrears of rent were cognisable only by the Ordinary Civil Courts. Such suits were governed by the Indian Limitation Act. As a necessary incident of such rights, minors were entitled to institute their suits within three years of their attaining majority, if the cause of action for rent arose during their minority. The claim in the suit now under appeal relates to the arrears which accrued due in Fasli 1315 when the appellant was a minor. He attained his majority in 1906. The Estates Land Act was passed by the local legislature in March 1908. In it a provision was inserted that the Act shall come into force on 1st of July 1908. His Excellency the Governor gave his assent to it on 25th March 1908. The assent of his Excellency the Governor-General was given on the 28th June. The Act came into force on the 1st of July. Section 189 of the Act enacts that suits for arrears of rent shall be instituted in the Revenue Courts, and removes such cases for the cognisance of Civil Courts. Section 211 provides that certain sections of the General Limitation Act *shall not apply* to suits instituted under the Act. The minority section 7 is one of them. The present suit was instituted by the appellant in the Revenue Court after the Estates Land Act came into force. It is conceded that the suit would be barred if section 7 of the Limitation Act did not apply. I am forced to the conclusion that the suit is barred. The pre-existing right, which carried with it the benefit of the Limitation Act, was to institute the suit in the Civil Court. That right could not have been sued upon under the old law in the Revenue Court. The new forum

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is the creature of the statute. It was designed to afford a speedy remedy to the parties. The plaintiff has chosen to avail himself of that advantage. He is also bound by the disabilities which the law imposes on such persons. I can follow the argument which claims for the plaintiff the right to institute his suit in the ordinary civil courts with the attendant advantage of counting in his favour a period of three years after attaining majority. To such an argument, the plea that the legislature should not be presumed to have deprived parties of their vested rights by *post facto* legislation may apply. But a litigant cannot approbate and reprobate. He cannot claim the advantage which the new law gives without submitting to the restrictions which it imposes.

The principle that vested rights should not be taken away by implication cannot apply to the present case. S. 211 lays down that the minority section of the Limitation Act shall not apply. There is no room for speculation here. It is an express prohibition. If a suit is instituted under the Act, it is not open to argument, that S. 211 is not applicable to it. The clear indication of the legislature takes this case out of the general rule. See per Lord Hatherly in *Pardo* v. *Bingham* [1]. The closely reasoned judgment of Benson and Sundara Aiyar JJ. in *Ramakrishna Chetty* v. *Subbaraya Aiyar* [2], was much relied upon in the course of the argument. I am not differing from the main propositions which that case enunciates. Excepting one matter of detail, to which I shall refer later on, I fully concur in the conclusions therein stated. In my opinion, it is not correct to say that the plaintiff in this case is deprived of his rights by giving retrospective effect to the Estates Land Act. He acquires one of his rights only under the Act, namely, the right to sue in the Revenue Court. He had a vested right for a longer period of Limitation before the Act came into force. As has been well stated "a statute is not retrospective.................because a part of the requisites for its action is drawn from a time antecedent to its passing" per Lord Denman C. J. in *The Queen* v. *St. Mary's White Chapel* [3]. That is the position in the present case. Lord Justice Buckley points out in *West* v. *Gwyne* [4]. "As a matter of principle an Act of Parliament is not without sufficient reason taken to be retrospective. There is, so to speak, a presumption that it speaks only

1. (1869) L. R. 4 Ch. 735. 2. (1912) 24 M. L. J. 54.
3. (1868) 12 Q. B. 127 s.c. 116 Eng. Rep. 812. 4. (1911) 2 Ch. 1.

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as to the future. But there is no like presumption that an Act is not intended to interfere with existing rights. Most Acts of Parliament, in fact, do interfere with existing rights." This dictum is specially applicable to enactments which while taking away some rights confer others which are no less important. See also *Phospho-Guano Co. Ltd.* v. *Guild* 1. On the ground that Section 211 is express, and on the further ground that the principle of retrospective extinguishment of vested rights does not arise in this case, I hold that the decision in *Ramakrishna Chetty* v. *Subbarayaiyar* 2 does not affect this case. In *Munjoori Bibi* v. *Akhel Mahamed* 3 *Budhu Koer* v. *Hafiz Husain* 4 and *Gopeswar Pal* v. *Jilen Chandra* 5 there was no express provision as in Section 211 of the Estates Land Act. Moreover in all those cases, a completed pre-existing right was sought to be put an end to by implication.

On the other hand, where the statute provides for a new procedure for the enforcement of rights, it is always retrospective; per Lord Blackburn in *Gardner* v. *Lucas* 6. In the present instance it is the procedure by which the arrears are to be recovered that is changed. The plaintiff is directed to seek redress in a Revenue Court instead of in the Civil Court. The decision of the Judicial Committee in *Soni Ram* v. *Kanhaiya Lal* 7 lays down that the Limitation Act in force at the time the suit is instituted governs the action and not the one under which the rights accrued. That decision governs the present case. See also *Chidambaram Chetty* v. *Karuppan Chetty*8 and *Hope Mills* v. *Vithaldas* 9. There is one circumstance which has not been noticed in *Ramakrishna Chetty* v. *Subbaraya Aiyar* 2. I stated at the outset the material dates regarding the passing of the Act and of the sanction obtained. One underlying principle of the cases which lean against retrospective operation is that if the new Act gives no days of grace for its coming into operation, but makes it law as soon as it is passed, courts should hold that the legislature did not intend to interfere with vested rights. But where litigants had previous notice and could have enforced their rights before the Act became law they cannot claim relief. On the day the legislature passed the Act, it deliberately put off its operation

1. (1871) L. R. 17 Eq. cases 433.
2. (1912) 24 M. L. J. 54.
3. (1912) 17 C. L. J. 316.
4. (1913) 18 C. L. J. 274.
5. (1911) I. L. R. 41 C. 1125.
6. (1877) 3 A. C. 582.
7. (1913) I. L. R. 35 A. 227 s.c. 25 M.L.J. 131.
8. (1910) 9 M. L. T. 75.
9. (1910) 12 Bom. L. R. 730.

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for over 3 months. It did not say that it shall become law as soon as the Governor-General's assent was obtained. It purposely gave parties a period of grace during which their remedies under the law as it stood could have been enforced. The plaintiff in claiming exemption by virtue of an equity should not be heard to say that although he might have enforced his rights between March and July 1908, he can plead that the Act does not apply to him because no time was fixed for its coming into force after the assent of the Governor-General was obtained.

As I feel strongly that the plaintiff has no right to avoid the statute under which he has come to Court, I respectfully differ from the conclusion at which the learned Chief Justice has arrived and agree with Sankaran Nair, J. in holding that the suit is barred by limitation.

Kumaraswami Sastri, J.—The appellant who is the Raja of Pittapur and whose estate was under the management of the Court of Wards attained majority on the 5th October 1906. He filed suits to recover rent due for fasli 1315 and claimed exemption from the bar of limitation on the ground that he had under S. 7 of the Limitation Act three years from the date of his attaining majority to file a suit for arrears of rent accrued due during his minority. The Deputy Collector in whose Court the suits had to be filed under S. 77 of the Madras Estates Land Act held that S. 211 of the Act applied and that the suits were barred as the plaintiff was not entitled to the benefit of S. 7 of the Limitation Act. The District Judge taking the same view confirmed the decree of the Deputy Collector. In Second Appeal Mr. Justice Sankaran Nair held that S. 211 of the Estates Land Act applied retrospectively and barred suits which would have been in time but for the Estates Land Act; while Mr. Justice Sadasiva Aiyar was of a contrary opinion.

The question raised in this appeal is whether S. 211 is retrospective and bars suits which would have been in time if the ordinary law of limitation was applied. The point is not free from difficulty, but I am of opinion that both on principle and on the balance of authority the section ought not to be applied so as to kill causes of action that were alive on the passing of the Act.

It is a well-known rule of construction that retrospective operation ought not to be given to a statute so as to take away

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vested rights unless that effect cannot be avoided without doing violence to the language of the enactment and that except in special cases the new law ought to be construed so as to interfere as little as possible with vested rights. I need only refer to *Reid* v. *Reid* [1], *Lauri* v. *Renad* [2]. The same view was taken by the Privy Council in *Mohamad Abussamad* v. *Kurban Hussan* [3], *Colonial Sugar Refining Co.* v. *Irving* [4]. Section 6, Cl. (c) of the General Clauses Act and section 8, Cl. (d) of the Madras Act I of 1891 are statutory recognitions of the same rule.

It is argued that as rules of limitation are rules of procedure and as nobody has a vested right as regards matters of procedure the plaintiff cannot plead S. 7 of the Limitation Act as giving him a longer period of Limitation as at the date of the suit the Estates Land Act had enacted that the Section is not to apply to suits for rent. Reference has been made to *Arayel Kali Amma* v. *Sankaran Nambudripad* [5], *Soni Ram* v. *Kanhaiya Lal* [6]. As observed by Mookerjee J. in *Mohamad Bibi* v. *Abdul Mohamed* [7], a Statute of Limitation ceases to be a statute of mere procedure where it shortens the period and is sought to be used to defeat causes of action which had accrued earlier than the length of time prescribed in the new law. The distinction has always to be borne in mind between mere matters of procedure and rights of suit which the procedure affects. The effect of the decision of the Privy Council in *Soni Ram* v. *Kanhaiya Lal* [6], on cases like the present has been discussed by the Full Bench of the Calcutta High Court in *Gopeswar Pal* v. *Jiban Chandra* [8], and I agree with the conclusion arrived at by the Full Bench that the provisions of an enactment should not unless it is absolutely necessary, be construed so as to make it impossible to exercise a vested right of suit. As pointed out by Justice Chatterjee at p. 1129, their Lordships of the Privy Council had not to consider the retrospective operation of special period of limitation provided by a local law coming into operation at once. In *Arayel Kali Ama* v. *Sankaran Nambudripad* [5], Miller and Krishnaswami Aiyar JJ. seem to rest their decision on the

1. (1886) L. R. 31 Ch. D. 402.
2. (1892) 3 Ch. 402.
3. (1876) L. R. 3 I. A. 30.
4. (1905) A.C. 369.
5. (1910) I.L.R. 34 M. 292 s.c. 20 M.L.J. 734.
6. (1914) I.L.R. 35 A. 227.
7. (1913) 17 C. L. J. 352.
8. (1914) I.L.R. 41 C. 1125.

ground that the new Limitation Act gave time to suitors to make applications under the old Act as the legislature postponed the coming into operation of the Act on 1st January 1909. In *Sundaramiyah* v. *Muthu Ganapathigal* [1], Justice Miller who was a party to *Arayel Kali Ama* v. *Sankaran Nambudripad* [2], was of opinion that Section 210 of the Estates Land Act cannot be retrospective. As the assent of the Governor-General was received only about three days before the Estates Land Act came into operation and as it is doubtful if the public knew of the assent before 1st July 1908, it cannot be said that the public had due notice. It cannot be said that they were bound to assume that consent was a mere matter of form and would be given as a matter of course especially as petitions had been sent by landlords against the measure.

The question as to the retrospective operation of section 210 was discussed in *Ramakrishna Chetti* v. *Subbaraya Aiyar* [3], where it was held that the rule of limitation in Madras Act I of 1908 was inapplicable to cases when the period of 3 years provided by it had expired before the Act came into force. The judgment of Benson and Sundara Aiyar, JJ. deals exhaustively with the whole question and I see no reason to dissent from the view taken by the eminent Judges who decided the case.

I do not think it makes any difference whether the alteration of the period of limitation is due to *a special provision in schedule A* to the Act or to *a special section in the body of the Act.* So far as I can see there is no difference in principle between the present case and the one reported in *Ramakrishna Chetti* v. *Subbaraya Aiyar* [3]. In both cases the legislature shortened the period of limitation for suits for rent and if the three years rule in Schedule A applied the suit would have been barred.

Some considerations were urged during the argument which I think are beside the point. It has been argued that as the Estates Land Act has prescribed a new forum in which the plaintiff has elected to sue, he is precluded from seeking the benefit of the exemption conferred by S. 7 of the Limitation Act. S. 77 of the Estates Land Act gives the plaintiff no option as to the forum and there is in the present case neither election nor benefit so far as he is concerned. It has also been suggested that the

1. (1912) M. W. N. 652. 2. (1910) I. L. R. 34 M. 292.
3. (1912) 24 M. L. J. 54.

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object of the Legislature was to preserve tenants from long-standing demands. This may be so as regards causes of action arising after the Act came into force or running at its date, but I can see no grounds for supposing that the legislature intended to deprive landlords of rents justly due to them at the date of the passing of the Act.

The correct rule seems to me to be that though laws affecting limitation might abridge or enlarge periods of limitation in cases of suits or causes of action which were alive at the date when the new enactment came into force and which under the old law would expire afterwards, the change cannot unless there is a clearly expressed intention to the contrary either by apt words in the enactment or otherwise, be retrospective so as to destroy rights of suits which were alive on the date.

I agree with the Chief Justice and would allow the Letters Patent Appeal and reverse the decisions of the Courts below and remand the suits for disposal. The respondents will pay the appellants' costs of this appeal. Other costs will abide and follow the result.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.
FULL BENCH.

Present :—Sir John Wallis, Chief Justice, Mr. Justice Seshagiri Aiyar and Mr. Justice Kumaraswami Sastri.

R. Srinivasa Iyengar ... *Appellant* (Petitioner).*

v.

S. K. M. R. M. Ramaswami Chettiar, by Agent Somasundaram Chettiar. *Respondent. (Respt).*

Srinivasa Iyengar v. Ramaswami Chettiar.

Letters Patent (Madras) cl. 15—'Judgment'—Order of a single judge refusing to interfere under S. 115 C. P. Code—Appealability.

An order of a single judge of the High Court declining to interfere in revision under S. 115 of the C. P. Code is one passed in the exercise of the 'appellate jurisdiction' of the Court within the meaning of S. 15 of the High Courts Act and is therefore a 'judgment' within cl. 15 of the Letters Patent. It is therefore appealable though no records were called for, or notice issued to the other side before the order was made

Obiter : The appellate Court, however, will not ordinarily interfere with the order of the single judge in matters of discretion.

Chappan v. *Moidin Kutti* 1, *Tuljaram Rao* v. *Alagappa Chettiar* 2, followed. *Venkatarana Iyer* v. *Macalai Ammal* 3, *Puthukudi Abdu* v. *Puvakka Kunhi Kutti* 4, overruled

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*L. P. A. 152 of 1913. 26th March 1915.

1. (1898) I.L.R. 22 M. 68. 2. (1910) I.L.R. 35 M. 1: s.c. 21 M.L.J. 1.
3. (1900) I. L. R. 23 M. 169. 4. (1903) I. L. R. 27 M. 341.

Srinivasa Iyengar v. Ramasawmi Chettiar.

Appeal under Clause 15 of the Letters Patent Act against the Judgment of the Honourable Mr. Justice Miller, dated 23rd October 1913 in Civil Revision Petition No. 110 of 1913, preferred to revise the decree of the Court of the Subordinate Judge of Kumbakonam in Small Cause Suit No. 1922 of 1912.

The petition out of which the present Letters Patent Appeal arises, was filed under S. 25 of Act IX of 1887, praying the High Court to revise the decree of the Court of the Subordinate Judge of Kumbakonam in Small Cause Suit No. 1922 of 1912. This petition came on for hearing under O. 41, R. 11 of the C. P. Code before *Miller, J.* who passed the following order :—" Upon perusing the petition and the judgment and decree of the lower Court and upon hearing the arguments of.. ....it is ordered that this petition be and hereby is dismissed." The petitioner preferred a Letters Patent Appeal against the order of *Miller, J.*

This appeal came on for hearing on Wednesday, the 3rd day of March 1915, when the Court, Seshagiri Aiyar and Napier, JJ.) made the following

ORDER OF REFERENCE TO THE FULL BENCH.

In this case Mr. Justice Miller, sitting in the Admission Court rejected the petition filed by the petitioner to revise the order of the Subordinate Judge exercising Small Cause Court jurisdiction. The question for consideration is whether the said order of the learned Judge is a *judgment* within the meaning of section 15 of the Letters Patent. On the principle of *stare decisis,* I am inclined to the view that it is a judgment : but as my learned brother takes the contrary view, it is desirable that the question should be referred for the decision of a Full Bench. The point on which the opinion is requested is " whether the order of a single Judge of the High Court rejecting the petition to send for the records and to revise the judgment of the Lower Court exercising Small Cause Court jurisdiction is a judgment within the meaning of section 15 of the Letters Patent."

S. T. Srinivasagopalachari for appellant.

I contend that the order is a judgment within cl. 15 of the Letters Patent. *Tulaja Ram Rao* v. *Alagappa Chettiar* [1], is an authority in my favour. The principle of that decision governs this case also.

1. (1910) I. L. R. 35 M. 1.

Srinivasa Tyengar v. Ramaswami Chettiar

[*The Chief Justice*—The order in this case was one made in the exercise of the discretionary powers of the High Court. Do you contend that it is a judgment ?]

The fact of a matter being within the discretion of a court is not a ground for refusing to entertain an appeal from an order of the Court. It may be a sufficient ground for declining to interfere. See Krishnaswami Iyer, J. in *Tuljaram* v. *Alagappa* [1].

[*The Chief Justice*—What is a judgment within cl. 15 of the Letters Patent ?]

If the effect of an order is to shut out evidence on the matter, it is a judgment. For the meaning of the term see *Tuljaram* v. *Alagappa Chetty* [2]. S. 25 of the Provincial Small Causes Courts Act no doubt gives a discretion to the High Court. The question of the right to appeal is quite different from how a matter of discretion should be dealt with by an appellate Court. (Here he was stopped by the Court).

G. S. Ramachandra Iyer for the Respondent.

Under S. 25 of the Provincial Small Causes Courts Act the High Court *may* call for the records and *may* pass such order as it thinks fit. Here the case was dismissed on admission. There was no hearing on the merits. There is no right on the part of a person to ask the Court to call for the record.

[*The Chief Justice*—The right is one given to the Court and not to the party. It is only as a matter of practice that the party moves the Court to call for the records.]

The Court has an option to call for the records in the first place and secondly to interfere. Refusal to exercise its discretion is not a judgment and there is no appeal from the order see *Puthukudi Abdu* v. *Kunhi Kutti* [3], *Chinnasami* v. *Arumugam* [4]. *Venkatarama Aiyar* v. *Madali Ammal* [5], *Palaniappa* v. *Venkatachelam* [6]

[*The Chief Justice*—How do you distinguish *Tuljaram* v. *Alagappa* [1]].

It was not a case of dismissal before notice. *Puthukudi Abdu* v. *Kunhi Kutti* [3], is exactly in point and was not referred to in *Tuljaram* v. *Alagappa* [1], The question was left open there. *Tuljaram* v. *Alagappa* [1] does not say that a refusal to call for the

1. (1910) I. L. R. 35 M. 1 at page 18. s. c. 21 M. L. J. 1.
2. (1910) I. L. R. 35 M. 1 at page. 16. s. c. 21. M. L. J. 1.
3. (1903) I. L. R. 27 M. 311.
4. (1903) I. L. R. 27 M. 432.
5. (1900) I.L.R. 23 M. 169.
6. (1909) 6 M. L. T. 345.

records is an adjudication. The observations of *Krishnaswami Aiyar J.* are *obiter* and refer only to a case where there is a dismissal after notice. The discretion referred to in *Tuljaram* v. *Alagappa*[1] is a discretion in disposing of the case and not a discretion in calling for the records. In the later case there is no adjudication.

[*Kumarasami Sastri, J.*—Why should it make any difference if a notice has been sent to the party and the petition is then dismissed. Sending a notice only means calling for more information.]

S. T. Srinivasagopalachari (in reply).

A refusal to adjudicate is a judgment. Adjudication on the merits is not necessary. See *Tuljaram* v. *Alagappa* [1]. *Puthukudi Abdu* v. *Kunhi Kutti* [2], and *Chinnasami* v. *Arumugam* [3], are dissented from in *Tuljaram* v. *Alagappa* [1].

[*The Chief Justice.*—Is it by right or by sufferance that you are heard on a revision from a Small Cause Court's judgment.]

I submit by right.

[*Kumaraswami Sastri, J.*—S. 25 negatives that. If a party has no right to be heard, he cannot be an aggrieved person if his petition is dismissed.]

I submit that the jurisdiction and power of the High Court to revise a judgment of the Small Cause Court is undoubted. The party has a right to ask the High Court to exercise that jurisdiction.

[*The Chief Justice.*—Granting that a party has a right, if the Court refuses to do anything with the case though petitioned by the party, is there a judgment ?]

Tuljaram v. *Alagappa* [1], says there is a judgment in such a case. See *Per Krishnaswami Aiyar, J.*—at page 17. An order of dismissal by a single Judge under S. 115 of the C. P. Code, is a judgment within Cl. 15 of the Letters Patent. By analogy the present order is a judgment, see *Chappan* v. *Moidin Kutti* [4], *Puthukudi Abdu* v. *Puvakka Kunhi Kutti* [2].

The Court expressed the following

OPINION.—We are bound by the decision of the majority of the Full Bench of five Judges in *Chappan* v. *Moidin Kutti* [4] to

1. (1910) I. L. R. 35 M. 1. s. c. 21 M. L. J. 1.
2. (1903) I. L. R. 27 M. 341. 3. (1903) I. L. R. 27 M. 432.
4. (1898) I. L. R. 22 M. 68.

Srinivasa Iyengar v Ramaswami Chettiar.

hold that in disposing of an application to exercise the High Court's revisional Jurisdiction over a Court subordinate to it a single Judge acts in the exercise of the appellate jurisdiction of the Court within the meaning of section 15 of the High Courts Act, and consequently that, if his order of disposal amounts to a judgment, an appeal lies from it under clause 15 of the Letters Patent.

We also think that we are bound by the decision of the Full Bench in *Tulajaram Rao* v. *Alagappa Chettiar* [1], to hold that such order is a judgment even when the Judge merely declines to interfere in revision, and that it is immaterial whether before such refusal the records were called for or notice issued to the other side. The decisions in *Venkatarama Aiyar* v. *Madalai Ammal* [2], *Puthukudi Abdu v. Puwakka Kunhi Kutti* [3], must therefore in our opinion be treated as overruled.

At the same time we think it right to say that in matters of discretion such as this, the Court will not ordinarily interfere on appeal though it has jurisdiction to do so. This is the practice of the Court of Appeal in England. (See Annual Practice, 1915, page 1911, citing *Golding* v. *Wharton & Co.* [4], and other cases) and *should*, we think, be followed here.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.
FULL BENCH.

Present:—Sir John Edward Power Wallis, Chief Justice, Mr. Justice Sankaran Nair and Mr. Justice Oldfield.

A Vakil of the High Court ... *Petitoner * (Respondent in C.M. P. No. 585 of 1914 on the file of the High Court.)*

v.

The President of the Vakil's Association, High Court Madras. *Respondent (Petitioner in do.)*

In the matter of a High Court Vakil.

Letters Patent (Madras) cls. 10 and 39—Order in disciplinary proceedings under cl. 10—Leave to appeal to Privy Council, if may be given.

An order of the High Court in the exercise of its disciplinary jurisdiction under cl. 10 of the Letters Patent is not governed by cl. 39 and therefore against such an order no leave to appeal to the Privy Council can be given.

In the matter of an Attorney [5], followed *G. S. D.* v. *Govt. Pleader* [6], *Tetley* v. *Jai Shankar* [7], referred to.

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*C. M. P. No. 2602 1914. 16th April, 1915.

1. (1910) I. L. R. 35 M. 1.
2. (1900). I. L. R. 23 M. 169.
3. (1903) I. L. R. 27 M. 341.
4. 1 Q. B. D. 374.
5. (1914) I. L. R. 41 C. 734.
6. (1907) I. L. R. 32 B. 106.
7. (1878) I. L. R. 1 A. 726.

In the Matter of a High Court Vakil.

Petition praying that in the circumstances stated therein the High Court will be pleased to grant the petitioner a certificate to enable him to appeal to His Majesty in Council from the order dated the 20th March 1914 of this Court in C. M. P. No. 585 of 1914 and to exempt the petitioner from furnishing security for costs.

On the 20th of March 1914, an order was made, under Cl. 10 of the Letters Patent, by the Chief Justice, Sankaran Nair, and Oldfield JJ. suspending the petitioner from practice for a period of three months, for professional misconduct. The order itself is reported in 26 M. L. J. 426. Against the aforesaid order the petitioner applied for leave to appeal to the Privy Council.

G. S. Ramachandra Iyer for the Petitioner.

The Court made the following

Order:—The petitioner relies upon the fact that leave to appeal was granted by this Court in a similar case C. M. P. Nos. 595 and 596 of 1912, but on a further consideration of the question we agree with the recent decision. *In the matter of an Attorney* [1] that disciplinary proceedings under clause 10 of the Letters Patent are not appealable under clause 39, and that we have no power to give leave to appeal to the Privy Council from an order passed in the exercise of such jurisdiction. This is also the view taken in *G. S. D.* v. *Government Pleader* [2]. In *Tetley* v. *Jai Shanker* [3], also it was held that no such leave could be granted and though in the subsequent case from Allahabad, *In re S. B. Sarbadhicary* [4], it appears that leave was granted by the Allahabad High Court the reports show that special leave to appeal was obtained from their Lordships before the appeal was heard.

The application is dismissed.

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1. (1914) I. L. R. 41 C. 734.
2. (1907) I. L. R. 32 B. 106.
3. (1878) I. L. R. 1 A. 726.
4. (1906) L. R. 34 I. A. 41.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Sir John Wallis, Chief Justice, and Mr. Justice Coutts-Trotter.

Rajah Damara Kumara Venkatappa Nayanim M. Bahadur Varu. *Appellant* in appeal No. 225 of 1912 and Respt. in appeal No. 136 of 1912 (Plff).*

v.

Damara Ranga Rao Varu. *Respondent in appeal No. 225 of 1912 and Appt. in appeal No. 136 of 1912 (Defendant).*

Rajah Damara Kumar Venkatappa Nayanim Varu v. Damara Ranga Rao Varu.

Hindu Law—Adoption—Co-widows—Preferential right of senior widow—Adoption by junior widow without consent of senior widow, though with consent of sapindas—Invalidity of.

Where a Hindu dies sonless leaving more than one widow, the preferential right to adopt (with the consent of the sapindas) vests with the senior among them and an adoption made by the junior widow without the consent of the senior widow, though with the consent of the sapindas, is invalid.

Kakerla Chukkamma v. *Kakerla Punnamma* [1], *Padaji Rao* v. *Rama Rao* [2], followed. *Rakma Bai* v. *Radha Bai* [3], and *Ranjit Lal Karmakar* v. *Bijoy Krishna Karmakar* [4], Referred to.

Per Chief Justice.—The senior widow is one of the 'kindred' whom it is the duty of the junior widow to consult, with reference to an adoption. The *Ramnad case* referred to.

Appeals against the decree of the District Court of North Arcot in O S. No. 23 of 1910.

One Gangadhara Nayanim Varu died without male issue in 1899. leaving him surviving two widows Venkata Varadamma and Venkata Ramanamma, hereinafter referred to as the senior and the junior widow respectively. On 10-5-1901 the junior widow adopted the plaintiff. On 12-5-1901 the senior widow adopted the defendant.

On 1-7-1907 the plaintiff instituted the present suit for a declaration that he and not the defendant was the legally adopted son of the deceased Gangadhara. The District Judge found that the junior widow (plaintiff's mother) obtained the assent of three out of five of the Sapindas of her late husband, that one of the remaining Sapindas did not assent to the adoption and that the

* A. S. Nos 225 and 136 of 1912. 29th April 1915.

1. (1914) 28 M. L. J. 72.
2. (1888) I.L.R. 13 Bom. 160.
3. (1868) 5 Bom. H. C. R. A. C. J. 181.
4. (1912) I. L. R. 39 C. 582.

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other was not consulted at all. He also held that the junior widow adopted the plaintiff without obtaining the consent of or even consulting the senior widow and he held that the adoption was therefore invalid. In the result, the District Judge dismissed the plaintiff's suit. The plaintiff appealed.

A. Krishnaswami Aiyar for the Appellant.

I submit that the adoption of the plaintiff is valid in law. A junior widow can make an adoption with the assent of the Sapindas but without the consent of the senior widow just as the senior widow can adopt without consulting the junior. It is settled law that the husband can *during his life-time* associate his junior widow with himself in the act of adoption. He can also authorise his junior widow to the exclusion of the senior, to adopt after his death. In such cases the junior widow is the adoptive mother and the senior widow is merely a step-mother. *Annapurni Nachiar* v. *Collector of Tinnevelly* [1] *Annapurni Nachiar* v. *Forbes* [2]. In fact when the husband authorises his junior widow to make an adoption, the senior widow's joining in the act is regarded as an act of supererogation on her part. *Chennappa Nayinivaru* v. *Ramappa Nayanivaru* [3]. If the husband can authorise any one of his two widows to adopt, the Sapindas can equally give their consent to any one of the two widows; for the consent of the Sapindas is co-extensive with the authority of the husband. *Sri Balusu Gurulingaswami* v. *Sri Balusu Ramalakshmamma* [4]. The only test of validity in such a case is, "would the adoption be valid if made with the authority of the husband". If it would be valid, then it would be equally valid if the consent of the Sapindas is given instead of the husband's authority. The assent of the kindred supplies the defect in the widow's power and in this respect it is as effective as the authority of the husband. *Vellanki Venkata Krishna Rao* v. *Venkata Rama Lakshmi* [5], *Parasara Bhattar* v. *Rangaraja Bhattar* [6] *Thayammal* v. *Venkatarama* [7], *Adivi Suryaprakasa Rao* v. *Nidamarti Gangarazu* [8]. The Viramitrodaya in Ch. II, Part 2, S. 9, deals with the assent of the kindred side by side with the authority of the husband. The assent of the kindred

1. (1895) I. L. R. 18 Mad. 277.
2. (1899) I. L. R. 23 Mad. 1.
3. (1900) 10 M. L. J. 131.
4. (1898) I.L.R. 22 M. 398 at 408.
5. (1876) I.L R. 1 Mad. 174 at 185, 187.
6. (1880) I. L. R. 2 Mad. 202.
7. (1887) I. L. R. 10 Mad. 205.
8. (1908) I. L. R. 33 Mad. 228.

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supplies the want of the husband's authority and is a legal substitute for the same. See *Collector of Madura* v. *Mootu Ramalinga* [1] and the same case on appeal *Collector of Madura* v *Mooto Ramalinga* [2]. These decisions go to show that the assent of the Sapindas can validate an adoption by the junior widow without reference to the senior. The case of *Kakerla Chukkamma* v. *Kakerla Punnamma* [3], is wrongly decided and the reasons given do not support the conclusion. The texts relied on in support of the alleged religious superiority of the senior wife have been discredited both by the Privy Council and the High Courts in cases dealing with the rights of inheritance and partition. *Jijoyiamba Bayi* v. *Kamakshi Bayi* [4], *Gajapathi Nilamani* v. *Gajapathi Radhamani* [5], *Janoki Nath Mukhopadhyaya* v. *Mathuranath Mukhopadhyaya* [6], and *Sundar* v. *Parbati* [7]. In these cases the passages in Colebrooke, Book IV, Ch. I Sloka 51 and Strange's Hindu Law, page 137 dealing with the alleged position of the senior widow as a *patni* are discussed and explained away. The alleged superiority of the senior wife, from a religious point of view was relied on in support of the claims of a junior son by a senior wife, in preference to a senior son by a junior wife, but it was expressly negatived. *Rama Lakshmi Ammal* v. *Sivanatha Perumal Sethurayar* [8], *Pedda Ramappa* v. *Bengari Seshamma* [9]. *Jagdish Bahadur* v. *Sheo Partab Singh*[10]. According to all the commentators all the wives are *patnies* and confer equal religious benefit on the husband. Smriti Chandrika Ch. XI, S. 1, pl. 9, 13, 57 ; Viramitrodaya, page 373 ; Mitakshara, Ch. II S. 1, pl. 5, 24. In *Jijoyiamba Bayi* v. *Kamakshi Bayi* [4], it is expressly stated that Mr. Strange's view relied on in *Kakerla Chukkamma* v. *Kakerla Punnamma* [3], is based on a misapprehension of the Dayabhaga. It is settled law that there is no difference between the two widows in their proprietary rights. *Gajapathi Nilamany* v. *Gajapathi Radhamani* [5], *Janoki Nath Mukhopadhyaya* v. *Mathuranath Mukhopadhyaya* [6], *Sundar* v. *Parbati* [7], *Ramakkal* v. *Ramasami Naicken*[11], *Vadali Mamidigadu* v. *Kottipalli*

1. (1861) 2 M. H. C. R. 206 at 231.
2. (1868) 12 M. I. A. 397
3. (1914) 28 M. L. J. 72.
4. (1868) 3 M. H. C. R. 424.
5. (1877) I. L. R. 1 Mad. 290.
6. (1883) I. L. R. 9 Cal. 580.
7. (1889) I. L. R. 12 All. 51.
8. (1872) 14 M. I. A. 570.
9. (1880) I. L. R. 2 Mad. 286.
10. (1901) I. L. R. 23 All. 369.
11. (1899) I. L. R. 22 Mad. 522.

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Ramayya[1] and *Durgadat* v. *Gita*[2]. Moreover the texts on which reliance is placed in support of the religious superiority of the senior wife deal with the duty of the husband during his lifetime and not with a state of things after his death. If, as held by the Privy Council, the husband can authorise any one of his two widows to adopt, how can it be said that the religious superiority remains so as to invalidate an adoption with the consent of the Sapindas.

The second argument in *Kakerla Chukkamma* v. *Kakerla Punnamma*[3], is based on the circumstance that the senior widow alone succeeds to an impartible estate and it is said that an adoption by a junior widow which will have the effect of divesting the senior widow's estate, ought not to be allowed. This argument has no force. The senior widow succeeds not on account of her inherent superiority but on account of the impartible character of the estate which requires that there should be only one holder. In such a case the senior widow is the preferential heir. Even in the case of males it is only the senior son that succeeds to the impartible estate and yet it cannot be contended that there is any difference between the sons. The argument based on divesting has no force because such a divesting takes place equally where the husband has authorised the adoption. In the case of partible property an adoption by the senior widow divests the interest or estate of the junior and yet the adoption by a senior widow with the consent of the Sapindas has been held valid, though the junior widow had not been consulted. *Narayanaswami* v. *Mangammal*[4]. The rule as to divesting has no application to a case where it is only the widow's estate that is divested. *Mondakini Dasi* v. *Adinath Dey*[5], *Sreeramulu* v. *Kristamma*[6], *Narayanaswami* v. *Mangammal*[4]. The decisions of the other High Courts are of no assistance in this case. In Calcutta an adoption can only be made with the express authority of the husband and the husband can authorise any one of his widows. *Annapurni Nachiar* v. *Forbes*[7]. The decision in *Ranjit Lal Karmakar* v. *Bijoy Krishna Karmakar*[8], does not touch the present question. The question there turned on the

1. (1902) I. L. R. 26 Mad. 334.
2. (1911) I. L. R. 33 All. 443.
3. (1914) 28 M. L. J. 72.
4. (1905) I. L. R. 28 Mad. 315.
5. (1890) I. L. R. 18 Cal. 69.
6. (1902) I. L. R. 26 Mad. 143.
7. (1899) I. L. R. 23 Mad. 1.
8. (1912) I. L. R. 39 Cal. 582.

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construction of a joint power which the Privy Council have held to be of doubtful validity. *Venkata Narasimha Appa Row* v. *Parthasarathy Appa Row* [1]. The Calcutta High Court in attempting a construction which would make the authority legal read it distributively (*i.e.*) one widow to exercise the authority and if she does not the other is to adopt. Nor are the Bombay cases of any assistance in the matter for there a widow can adopt even without the authority of the husband. So when there are 2 widows the right is treated as joint and the distributive construction is adopted. But the decision in *Padaji Rao* v. *Ram Rao* [2], in so far as it is based on the senior widow being the *patni* cannot be supported in view of the decisions in *Jijoyiamba* v. *Kamakshi* [3], *Gajapathi Nilamani* v *Gajapathi Radhamani* [4], and *Jagannath Mukhopadhyaya* v. *Mothuranath Mukhopadhyaya* [5]. In all these cases the etymology of the term '*patni*' is discussed and the expression is extended to all the wives.

[That portion of the argument relating to the alleged invalidity of the adoption on the ground that all the Sapindas were not consulted is not reported as the point though argued at the bar was not made the basis of decision by their Lordships.—Ed.]

T. V Venkatarama Aiyar (*V. Ramesami* with him) for the Respondent.

I submit that the senior widow must be consulted at all events. If the senior widow consents then the junior may adopt; otherwise, she cannot, except in certain circumstances. The position of the senior widow is stronger in Madras than in Bombay or Calcutta and her consent is all the more necessary in this Presidency. The argument on the other side that the consent of the Sapindas is equivalent in all respects to that of the husband, is not correct. The authority of the husband is founded on his power of disposition over his property at the time of his death. He can authorise one widow, to adopt, to the exclusion of the other just as he can dispose of his property in favour of one. The consent of the Sapindas rests on no such basis.

All the High Courts purport to proceed on the basis of Vasishta's Text. "Nor let a woman give, or accept, a son, unless with the assent of her lord." Sacred Books of the East, Vol. 25, Page 31. In Madras the consent of the Sapindas is equivalent to the implied assent of the husband.

1. (1913) I. L. R. 37 M 199; s.c. 26 M. L. J. 411. 2. (1888) I. L. R. 13 B. 160.
3. (1868) 3 M. H. C. R. 424. 4. (1877) I L.R. 1 Mad. 290.
5. (1883) I. L. R. 9 Cal. 580.

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In Bombay the consent of the husband is implied in the absence of express prohibition. The elder widow can adopt without the junior's consent. *Rukma Bai* v. *Radha Bai* [1]. But this doctrine has not been extended so far as to enable a junior widow to adopt without consulting or obtaining the consent of the senior. *Padaji Rao* v. *Ram Rao* [2]. In Calcutta where two widows have got the consent of their husband, the junior cannot adopt without the senior's consent. *Ranjit Lal* v. *Bijoy Krishna* [3]. The Madras decisions also are to the same effect. *Narayanaswami* v. *Mangammal* [4], and *Kakerla Chukkama* v. *Kakerla Ponnama* [5].

[*The Chief Justice.* What do you say as regards the dictum of Sir J. Colville in *Vellanki Venkatakrishna Rao* v. *Venkata Rama Lakshmi* [6], that the consent of the Sapindas is on all fours with the authority of the husband.]

I submit that that observation though general, was meant only to govern the particular case before the Privy Council.

[*The Chief Justice.* Apart from authority, what is the reason for the rule requiring the consent of the senior widow in a case like this ?]

The senior wife is the '*patni*' or the wife pre-eminently fit to be associated with the husband in religious acts.

[*The Chief Justice.* "Patni" includes the other wives also. Is it not a general term.]

For purposes of inheritance all the wives are "*patnies*". The Mitakshara does not base its system of inheritance on religious superiority. But adoption is essentially a religious act and the senior wife, by virtue of her religious superiority has got a preference. See Mitakshara Book I, Ch. III; Verse 88, Colebrooke's Digest Vol. 2, pp. 124 to 126, where all the other texts are collected; Steele on Hindu Law and Custom, pp. 31 and 48; West and Buhler, p. 977 ; Sir T. Strange's Hindu Law, Vol. I, p. 55; *Anna-Purni Nachiar* v. *Collector of Tinnevelly* [7].

There is another reason for the preferential right of the senior widow. Originally the senior widow alone was entitled to inherit, the other widows being entitled only to maintenance. Gradually the right of inheritance was extended to the junior widow also. Even now the senior widow stands in the position

1. (1868) 5 Bom. H. C. R. 181 at 186. 2. (1888) I. L. R. 13 Bom. 160.
3. I.L.R. 39 Cal. 582.
4. (1905) I. L. R. 28 M. 315 s. c. 15 M. L. J. 143.
5. (1914) 28 M. L. J. 72.
6. (1876) I. L. R. 1 M. 174, s c. I. R. 4 I. A. 1.
7. (1895) 18 M. 277 at 280, s.c. 5 M. L. J, 121.

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of a manager and the junior widow's right is only to sue for a partition As manager the senior widow has far greater powers of alienation. than the other widows. The larger proprietary rights of the senior widow give her a preferential right to adopt. This is specially so in the case of an impartible estate, as here. There the senior widow alone inherits. If her estate is to be divested, she must herself do it or at any rate must consent to its being done by the junior widow. Otherwise the senior widow's estate will be divested by a collusive adoption brought about by the junior widow with the consent of the Sapindas. If the preferential right of the senior widow were not upheld, there will be an "unseemly scramble" among the co-widows for the purpose of performing this solemn Act.

Next I contend that the senior widow is herself a Sapinda and has to be consulted as such. See *The Collector of Madura* v. *Mootu Ramalinga* [1]. where the Privy Council refer to the mother-in-law as a protector, etc. of the daughter-in-law. See also *Bhimana* v. *Sangama* [2].

To argue that because the husband could have authorised the junior widow to adopt the consent of the Sapindas also is effective for that purpose, is to ignore the difference between the two powers. The husband's power is more in the nature of a testamentary character. In the exercise of that power, he deals with his own property, appoints a guardian for his child, etc., by selecting a single widow to adopt for him. Moreover the husband can select the boy himself. The Sapindas have the right merely to determine whether the property is to be with the widow or with an adopted son, who, but for the adoption, would have no right. They have no power to select the boy. The husband can authorise successive adoptions. It is doubtful, if the Sapindas can. There are also other differences. See *Danakoti Ammal* v. *Balasundara Mudaliar* [3].

The argument on the other side based on stray general observations of the Privy Council, divorced from their contexts is I submit, untenable A case is an authority only for what, it decides. The preferential right of the senior widow and the necessity for her consent in order to validate an adoption by the junior widow rest "on views of Hindu life and economy" as

1. (1868) 12 M. I. A. 397 at 444. 2. (1896) I. L. R. 22 Bom. 206.
3. ( ) I. L. R. 36 M. 19 at 28.

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pointed out in *Ranjit Lal* v. *Bijoy Krishna* [1]. See also *Kakerla Chukkamma* v. *Kakerla Punnamma* [2].

A. Krishnaswami Aiyar (in reply).

The texts relied on by the other side are in Colebrooke's Digest, Vol. II, pp. 124 to 426 and these have been interpreted to us by the later Commentators and by the Privy Council.

The texts themselves deal with the duty of the husband to his wives. They have been ignored by the Privy Council in recognising the right of the husband to select any one of his wives for the purpose of adoption. In the face of the decisions of the Privy Council already cited how can any effect be given to an inferential argument based on the texts. The ancient texts themselves are inconclusive. Katyayana says that the test of superiority among wives is merit and not seniority. The Commentators as well as the decisions recognise the equal rights of the widows as regards inheritance. A Court of law has to interpret the ancient Smriti texts only in the way in which the later Commentators of the particular school have interpreted them. See *Collector of Madura* v. *Mootoo Ramalinga* [3]. A senior wife is not a Sapinda. A wife succeeds to her husband's estate not as a Sapinda but as one of the enumerated heirs. The definition of "Sapinda" in the Acharakanda of the Mitakshara cannot be imported into other contexts. There is no force in the contention that a Sapinda within the definition of the Acharakanda is a Sapinda for every purpose. The theory of Sapinda's consent is based on the presumed incapacity of women as such. *Collector of Madura* v. *Mootoo Ramalinga* [3]. Sircar on Adoption page 228, Mayne page 725. One widow has no greater capacity than the other. In this view no woman is a Sapinda for the purpose of the rule as to Sapinda consent. In regard to inheritance, it has been held that women inherit not as Sapindas but by virtue of special texts. *Seethaiammal* v. *Nachiar Ammal* [4], *Ramachandra Martanda Waikar* v. *Vinayak Venkatesh* [5]. The argument that a widow is a Sapinda proves too much for in that case the junior widow also must consent to an adoption by the senior. This

1. (1912) 39 Cal. 582. 2. (1914) 28 M. L. J. 72.
3. (1868) 12 M.I.A. 397 at 436. 4. (1912) 26 M. L. J. 10.
5. (1914) 27 M. L. J. 383.

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however is not the case *Narayanswami* v. *Mangammal* [1]. It is *petitio principi* to get over the difficulty by stating that it is the junior widow's duty to consent to the adoption by the senior widow.

For, it is presuming the senior's preferential right, which is the question at issue On the question of the divesting of the estate of the senior widow, this argument applies with equal force, in the case of partible estates, to an adoption by the senior without the junior's consent. The distinction sought to be made between the husband's authority and the authority of the sapindas is unsound and opposed to the decision of the Privy Council. *Vellanki Venkata* v. *Venkata Rama Lakshmi* [2]. A husband can no more compel his widow to adopt than a Sapinda. As regards the limits of power, both stand, on the same footing. In the matter of successive adoptions, no inference can be drawn as to the powers of the husband and the Sapindas, from a point which is yet unsettled.

The Court delivered the following

Judgments :—*The Chief Justice* :—The plaintiff-appellant in this case bases his claim to succeed to the estate of the late Gangadhara Rama Nayanim on the ground that he was duly adopted by the junior widow with the consent of the Sapindas after the senior widow had refused to adopt a boy. The District Judge has found, and we agree with him, that no such refusal is proved. On the other hand the evidence shows that the senior widow who left the family house shortly after her husband's death set up almost at once that her husband had authorised her to adopt during his lifetime. It also appears that two days after the adoption of the plaintiff by the junior widow, and as soon as she heard of it, she went through the form of adopting the defendant purporting to act under the alleged authority from her husband. The District Judge found that this authority had not been proved, but this finding did not affect the result as he also found that the plaintiff's adoption by the junior widow was invalid on the ground that it was made by her without consulting the senior widow and obtaining her consent, and also because it was made without consulting one of the nearest reversioners of the deceased, and that consequently he had no right to due.

1. (1905) I. L. R. 28 M. 315. 2 (1876) I. L. R. 1 M. 174.
3. (1910) M. W. N. 620.

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The view taken by the District Judge as to the senior widow's consent is in accordance with a subsequent and very recent decision of *Sankaran Nair* and *Spencer JJ.* in *Kakerla Chukkamma* v. *Kakerla Punnamma* [1], where it was held that the senior widow has a preferential right to adopt, and that, so long as such preferential right subsists, the junior widow has no right to adopt. The learned Judges, one of them a Hindu Judge of long experience, based the decision not only on the decisions of the Bombay and Calcutta Courts but also on the preferential right of the senior widow to perform religious acts such as adoption.

The question which is one of considerable importance and had not previously come before this court has again been very ably and elaborately argued before us by Mr. A. Krishnaswami Aiyar for the appellant and by Mr. T.V. Venkatarama Iyer for the respondent; and after a careful consideration of their arguments, I see no reason to differ from the conclusion arrived at by the learned Judges or the grounds on which it was based.

The preferential right of the senior widow as regards religious acts is in my opinion clearly established. The Mitakshara, Book I, chapter, III, verse 88, which has been specially translated for us, first cites the text of Yajnavalkya "when there is a wife of an equal class present, never do acts of religion with any other. When there is more than one wife of the same class as yourself in matters of religion never employ any but the eldest." On this Vignaneswara comments as follows:—"When there is a wife of equal class never do acts of religion with wives of any other class. When there are several wives of the same class in matters of religion do not pass over the eldest wife and do not employ either the second or the third, (lit, the middle or the youngest one). See also Colebrooke, Vol. 2, Digest Pages 124 to 126. The senior widow's preferential right of adoption is expressely recognised in Steele's Law and Custom of Hindu castes, page 48, which embodies the results of an enquiry held in the year 1831 as to the Hindu Customs and usages prevailing in the Deccan; and in *Padajirao* v. *Ram Rao* [2], *Sargent C. J.*, after referring to this passage observed that the superior right of the elder widow was doubtless based on her being the *patni* and as such entitled to take part with her husband in all religious ceremonies. I

1. (1914) 28 M. L. J. 72. 2. (1888) I. L. R. 13 B. 160 at 166.

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think that here the learned judge was only offering an explanation of the usage prevailing in the Deccan, and even if, as contended by the appellant, he was mistaken in supposing that the senior wife alone was entitled to be styled *patni*, I do not think that matters much, as it does not affect the preferential right of the senior wife to perform religious acts. As regards the meaning of *patni* it appears from the passages in the Mitakshara and Viramitrodaya referred to in *Janokinath Mukhopadhya* v. *Mathuranath Mukhopadhya* [1], that the celebrated grammarian *Panini* considered that the word has been formed by affixing the particle *ni*, to *pati* (husband), to signify one who partakes in the holy sacrifices. Fanciful as this may be, it was of course accepted on *Panini's* authority by the Commentators, and *Vignaneswara* after referring to it states that all the wifes were to be regarded as *patnies* and as such entitled to share in the inheritance. The omission in *Colebrooke's* translation of the Mitakshara, of this passage which is now accepted as genuine was responsible for *Strange's* view that the senior widow alone was entitled to succeed, a view which has been overruled by *Kissen Lala* v. *Javallah Prasad Lala* [2], and by the Privy Council in *Gajapathi Nilamani* v. *Gajapathi Radhamani* [3] which only left her the exclusive right of management until partition. Admitting however, that the junior wives are *patnies* in the sense of being capable of partaking in sacrificial acts, it still remains true on the express authority of the Mitakshara already cited, that the senior wife has the preferential right, as regards religious acts, and this appears to me to be a sufficient foundation for her preferential right as to adoption.

It is then said that the learned Judges were wrong in applying the Bombay rulings (*Rakhmabai* v. *Radhabai* [4] *and Padaji Rao* v. *Ram Rao* [5], to this Presidency and that these decisions are opposed to the decisions of the Privy Council with reference to adoption in this part of India beginning with the *Ramnad case* [6]. But, as pointed out by their Lordships in that case, the law of adoption in all these Presidencies rests on the text of Vasishta "Nor let a woman give or accept a son without the consent of her lord." And the main difference is as to the circumstances in which such consent should be considered.

1. (1883) I. L. R. 9 C. 580, 588. 2. (1867) 3. M. H. C. R. 351.
3. (1876) I. L. R. 1 M. 290. 4. (1868) 5 Bom. H. C. R. A. C. J. 192.
5. (1888) I. L. R. 13 B. 160. 6. (1868) 12 M. I. A. 397.

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to have been given in evidence of express authority being required in Bengal, whereas in Bombay it is presumed except in cases where the husband was the member of a joint family where the consent of the managing member is required, while in Madras, as held by their Lordships in the *Ramnad case*, on a variety of considerations the want of the husband's consent may be supplied by the consent of his kindred. Following the Bombay decisions, the Calcutta High Court has recently held that, where the husband authorised his two widows to adopt he must be held to have intended the senior widow to have the preferential right. The Bombay decisions, *Jenkins C. J.* observed, "rest upon fundamental principles and on views of Hindu life and economy which appear to me to be fully applicable here. Any other view would merely lead to an unseemly scramble for the purpose of performing this solemn act". These observations in my view are equally applicable in this Presidency, where as observed by their Lordships in *Sri Virada Pratapa Ragunada Deo* v. *Sri Brozo Kishoro Patta Deo* [1], the law in this respect is something intermediate between the stricter law of Bengal and the wider law of Bombay. Further in view of the inconveniences attendant on simultaneous rights of adoption, and in the significant absence of any evidence that such an equal right has ever been claimed in our Courts for junior widows prior to these two cases, I think the onus is on those who assert it to show that the law in Madras differs in this respect from that which prevails in the adjoining Presidency. In the case of impartible estates the estate necessarily vests in the senior widow, and the result of holding that the junior widow with the consent of a majority of the Sapindas has the right to adopt without reference to the senior widow would be to render the latter's tenure of the estate exceedingly precarious. The absence until now of any such attempt by the junior widow and Sapindas goes far to show that the rule in this Presidency has been the same as in Bombay, and that we should effect an innovation by holding otherwise.

It is then argued that the equal right of the junior widow is to be deduced from decisions of their Lordships of the Judicial Committee in which the question was not raised or considered. These arguments must be received with great caution as their Lordships' observations were only directed to the questions

1. (1876) I. L. R. 1 M. 69, 31.

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before them. In the *Ramnad case* [1] it was held not only on the authority of the Smriti Chandrika and the Dattaka Meemamsa but also on the ground of proved usage that in Madras a Hindu widow not having her husband's permission might lawfully adopt if duly authorised by his kindred the assent of the kinsmen being apparently required by reason of the presumed incapacity of women for independence. The question of priority among co-widows did not arise and was not considered in the case. The further explanation of that decision by their Lordships in *Sri Varada Pratapa Raghunada Deo* v. *Sri Brozo Kishoro Patta Deo* [2], as to what amounts to a sufficient consent of kinsmen does not affect the present question. In the next case *Vellanki Venkatakrishna Rao* v. *Venkata Ramalakshmi* [3], where the question was whether an adoption made by a widow with the assent of the kindred after the death of her natural son was valid, their Lordships held that the husband during his lifetime might have authorised his wife in the event of the death of the natural son to adopt another son, and, if she could have done it with the husband's assent, she could equally do it with the assent of the kindred. Their Lordships no doubt laid down generally, but of course with reference to the facts before them, that a widow without permission from her husband may if duly authorised by her kinsmen adopt a son to him in every case in which such an adoption would be valid if made by her under written authority from her husband. This is the major proposition of the syllogism. The minor is to be found in the observation of their Lordships in *Annapurni Nachiar* v. *Forbes* [4]. "It seems not to be doubted that a man may authorise one of several wives to adopt after his death or that she would on adoption stand in the place of the natural mother." We are then asked to conclude that a junior widow with the consent of the kinsmen may adopt without reference to the senior widow. The fallacy of this argument in my opinion consists in applying the general expressions of their Lordships in *Vellanki Venkatakrishna Rao* v. *Venkata Ramalakshmi* [3], to a case which was not before them and which involves, as I have sought to show, considerations of authority, usage and convenience which were not presented to them.

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1. (1868) 12 M. I. A. 397.
2. (1876) I.L.R. 1 M. 69, 81 (P. C.)
3. (1876) I. L. R. 1 M. 174 (P. C.)
4. (1899) I.L.R. 23 M. 1 at 9 (P. C.)

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The decision of the Bombay High Court in *Rakhmabai* v. *Radhabai* [1], that the senior widow is entitled to adopt without the consent of the junior widow, and the decision of this Court in *Naryanasami Naick* v. *Mangammal* [2], that in this part of India the senior widow with the consent of the kinsmen may proceed without the consent of the junior widow, must be considered as proceeding on a recognition of the senior widow's preferential right, and are no authority for holding that the junior widow may adopt without the senior's consent.

Mr. Venkatrama Aiyar for the Respondent also argued that in any case the senior widow was entitled to be consulted as one of the kindred, while on the other side it was argued that a widow is not a *Sapinda* but only succeeds as one of the enumerated heirs. I do not think it necessary to go into this question, but having regard to the decision of their Lordships in *The Ramnad case* [3], that the assent of the mother-in-law Muthuveroyee in that case was operative in support of the adoption, I should be disposed to hold that the senior widow was one of the kinsmen whom it was the duty of the junior widow to consult and that the adoption was bad for failing to consult her.

I do not consider it necessary to consider on the evidence whether as found by the District Judge there was a failure to consult one of the next reversioners, because for the reasons already given, I think that Appeal No. 225 fails and must be dismissed with costs. For the purposes of this appeal it is not necessary to consider the findings as to the adoption by the senior widow of the 1st defendant. It has also become unnecessary to hear the cross appeal of the 1st defendant against the finding that he was not validly adopted by the senior widow, as that finding has become immaterial to the decision.

Appeal No. 135 is withdrawn by consent. No order as to costs.

Coutts Trotter, J. I also desire to express my indebtedness to the able and lucid arguments which have been addressed to us, from which I have derived much assistance and instruction. Up to a certain point the law is clear, and its provisions are a common-starting point to both parties ; and the following propositions may be laid down. In Bengal a widow can only adopt if the husband has before his death given his express authority to her to do so. In Bombay, the consent of her husband is always

1. (1868) 5 Bom H. C. R. A. C. J. 192. 2. (1905) I. L. R. 28 M. 315.
3. (1868) 12 M. I. A 397.

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implied and she can adopt without proving any authority on her own motion. In Southern India, she can adopt without express authority, if she obtains the consent of the Sapindas of her husband. When a man has more wives than one, he can associate any one of them with him in adoption, and can give an authority to any one of them to adopt after his death; his choice is in no way restricted and he can prefer the junior widow to the senior, the younger to the elder. It is argued for the appellant here, that as the junior widow can adopt with the authority of her deceased husband, she is in exactly the same position if she obtains the consent of the Sapindas for the sole object and import of the consent of the *Sapindas* is that it should be the equivalent of the authority of the husband. In support of this view of the scope and nature of the authority of the *Sapindas*, reliance was placed on the judgment in *Vellanki Venkatakrishna Row* v. *Venkata Rama Lakshmi* [1] and particularly on the observations of *Sir James Colvile* at pages 184 and 187.

For the respondent reliance was placed on the fact that both in Bengal, where the rule is stricter, and in Bombay where it is laxer than in Madras, the junior widow is not allowed to adopt in preference to or without the consent of the senior. See *Padaji Rao* v. *Rama Rao* [2], and *Rangit Lal Karmakar* v. *Bijoy Krishna Karmakar* [3]. In the Bengal case, the question arose and only could arise where a husband had given an authority to his wives to adopt, without distinguishing between them: the court read the authority distributively, and held that its exercise was restricted in the first instance to the senior widow. In the Bombay case, where there was no question of express authority, it was held that the power was not exercisable by the junior widow without the consent of the senior. Mr. Krishnaswami Aiyar, while prepared if necessary to say that these cases are wrong or at any rate have no application to Madras, distinguishes them from the present case. He points out that the Calcutta case only laid down a rule for the construction of an authority given to two persons and that the Bombay case applies the same construction to an implied authority. Here we have an express authority, that of the Sapindas, to a definite person: and he contends that there is nothing in either decision to prevent our giving effect to it.

1. (1876) I. L. R. 1 M. 174. 2. (1888) I. L. R. 13 B. 160.
3. (1912) I. L. R. 39 C. 582.

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An English Judge in deciding a question of English common law is in theory declaring what custom on the subject has subsisted immemorially in the country (Stephen's Blackstone Vol. I. Introduction Section I.) An Indian Judge in deciding a question of Hindu Law is in theory expounding the true construction of mandatory utterances to which a divine origin is ascribed, aided or impeded in his task by ancient commentaries, text books of authority, and judicial decisions of the Indian Courts and of the Privy Council. Nowadays there is little but fiction in either theory, and a judge in both countries has only to apply the principles of previous decisions to particular sets of facts. But I think that theoretical objection has just this much effect; that the argument that a suggested result is not in accordance with known practice will have less weight in India, if it can be shown to be the logical deduction from the authorities. In the present case I feel it very difficult to escape from the conclusion that *Vellanki Venkata Krishna Rao* v. *Venkata Rama Lakshmi* [1], has declared the consent of the sapindas to be in all respects the equivalent of express authority from the husband. On the other hand, it is quite clear from the books that to give effect to the appellant's contention would be quite contrary to what everyone has hitherto supposed to be the law, and to legalise what in practice is a complete innovation. It is also a practice likely to lead to extreme inconvenience, to use no stronger term. In this state of things, I find that two Judges of this Court have in *Kakerla Chukkamma* v. *Kakerla Punnamma* [2], decided this question adversely to the appellant; one of those judges being *Sankaran Nair, J.* whose authority on such a subject has the weight of his great experience. Further, I find that my Lord in the present case takes the same view. That being so, I think it would be quite wrong for me to give expression to any opinion that might tend to unsettle the former decision of this Court, or give any encouragement to its challenge in other cases. The expressions used in the Privy Council in *Vellanki Venkata Krishna Rao* v. *Venkatarama Lakshmi* [1], were not really necessary to the decision and I think if the decision in *Kakerla Chukkamma* v. *Kakerla Punnamma* [2], is to be challenged, it must be challenged elsewhere than in this Court. The appeal fails and is dismissed with costs. I agree with the order proposed in my Lord's judgment.

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1. (1876) I.L.R. 1 M. 174. 2. (1914) 28 M.L.J. 72.

PRIVY COUNCIL.

Present:—Lord Shaw, Sir George Farwell, Sir John Edge and Mr. Ameer Ali.

[On Appeal from the High Court at Bombay.]

P. C.
Bal Gangadhar Tilak v. Shri Shriniwas Pandit.

Bal Gangadhar Tilak and others ... *Appellants**

v.

Shri Shriniwas Pandit and another ... *Respondents.*

*Hindu Law—Adoption—*Datta Homam *ceremony, when necessary—Will—Trustees—Want of consent of one of five trustees—Effect—Evidence Act, Ss. 33, 145—Depositions in other cases, when and how to be used—Documents, use of, to contradict witness—Practice—Pleadings—Fraud, undue influence and coercion—General allegations insufficient—English and Indian Law.*

Under the Hindu Law, the performance of the ceremony of *Datta Homam* is not essential to the legal validity of an adoption among Brahmins where the child to be adopted belongs to the same *Gotra* as that of the adoptive father.

Valubhai v. *Govind Kashinath* [1], approved.

Govindayyan v. *Dorasami* [2], Referred to.

Where a Hindu testator authorised his widow to adopt a son to him with the consent of five trustees whom he had appointed under his will. Held that the consent of a trustee who declined to act was unnecessary to validate an adoption by the widow.

Quære: Whether the consent of the majority of the trustees was not enough to validate the adoption?

A civil cause must be judged of by the evidence led therein and depositions in a criminal case must not be imported in bulk into another case in the absence of the circumstances specified in S. 33 of the Evidence Act.

Evidence given in a former case should not be used for the purpose of either contradicting or discounting the evidence of the witnesses in a suit, unless the particular matter or point has been placed before the witness as one for explanation in view of its discrepancy with the evidence then being tendered.

Under S 145 of the Evidence Act, if a witness is under cross-examination on oath, he should be given the opportunity, if documents are to be used against him, to tender his explanation and to clear up the particular point of ambiguity or dispute. The duty of enforcing this rule is all the more imperative where a witness's reputation and character are at stake.

Under the Contract law of India, as well as under the English Law, coercion, undue influence, fraud and misrepresentation are all separate and separable categories and must be alleged with sufficient particularity.

Gupta v. *Tiluckram Chowdhry* [3], Referred to.

Appeal from a judgment and decree of the High Court at Bombay dated September 23, 1910, reversing the judgment and decree of the Subordinate Judge of Poona, dated July 31, 1906.

One Baba Maharaj, a Brahmin by caste, and a first class sardar in the Deccan, died on August 7, 1897. He made a will by which he appointed five persons as trustees or Panch, to look after the management of his estate and directed that if his wife, Tai

* 26th March, 1915.

1. (1899) I. L. R. 24 Bom. 218. 2. (1884) I. L. R. 11 Mad. 5.
3. (1888) L. R. 15 I. A. 119.

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Maharaj, who was then pregnant gave birth to a boy who was short-lived; a boy should be adopted to perpetuate his name, the management of his estate being vested in the trustees as before. Of the five trustees one declined to act and the remaining four obtained probate. A boy was born to her, on June 18, 1898, but he died two months later. On June 18, 1901, the trustees met to discuss the question of adoption; and after several consultations on June 20, 1901, took the widow (Tai Maharaj) to Aurangabad to select a boy for adoption. A great many boys were brought for the purpose of selection. Pandit Maharaj was then selected, & on 27th June verbal gift and acceptance was made and mutual documents, deed of adoption, etc., were passed on the 28th. On her return two letters were written to the Political Agent for the Sardars of the Deccan stating that a boy had been selected at Aurungabad. On July 6, 1901, the said Tai Maharaj went to the Political Agent and stated that she did not approve of the boy selected by Tilak, and that she wished to adopt a boy at Kolhapur. On July 7, 1901, Tai gave notice to the trustees to cease having anything to do with the estate while the trustees (one of whom had refused to act) sought an injunction to prevent her from adopting on the ground that their consent for such an adoption was necessary. She then wished to adopt in her own house, but the guests who were invited to take part in the ceremony were turned out by the order of Tilak and Khaparde, two of the trustees and Tai practically kept in confinement for several days. Tai then applied for the revocation of the probate, in the course of which proceedings Tilak deposed to the physical giving and taking of Pandit Maharaj, and a prosecution was instituted against him for perjury. On Aug. 9, 1901, Tai Maharaj adopted Bala Maharaj. The appellants then instituted the present suit that Tai Maharaj had taken Pandit Maharaj in adoption at Aurangabad, on June 27, 1901. On the death of Tai, her daughter was made a party and she challenged the adoption. The Subordinate Judge decided that physical giving and taking on June 28, 1901, was established and that non-performance of *datta homam* was immaterial. These findings were on appeal reversed by the High Court which held that physical giving and taking had not taken place and that if it had taken place, it was brought about by an amount of pressure on the lady which deprived it of the character of an act freely and willingly assented to by her. Against this decision the appellants appealed to His Majesty in Council.

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Sir Erle Richards, K.C., Sir W. Garth and *Parikh* for the appellants. The High Court has held that there was no adoption as it was brought about by undue influence of the appellants. The dispute was as to the observance of the proper ceremony. There was no ceremony necessary excepting the physical taking, in the case of *sagotras*. The appellants (Tilak and Kharparde) had nothing to gain, and therefore the question of undue influence must fail. There was no inducement as the widow was throughout anxious to adopt a son. Discussions for adoption lasted for three years and the claim of every eligible boy was considered from her point of view alone. No coercion or under influence was pleaded; nor was it in issue. It was for the first time raised in the High Court which decided against the appellants on that point. No relief should be granted on that ground. *Abdool Hosein Zerail Abadin* v. *Turner* 1 was referred to. [(*Lord Shaw* referred to *Wallingford* v. *Mutual Society* 2] Reference was also made to *Ganga Narain Gupta* v. *Tiluckram* 3, Ss. 146, 149 C. P. Code 1882 and *Bayabai* v. *Bala Venkatesh* 4. The Subordinate Judge decided that the adoption had taken place, but the High Court decided against it by drawing inferences from documents. The documents were not put to the appellants who were under cross-examination for several days. Nagpurkar was at the bottom of all these proceedings, but he was not called as a witness. There was also a deed of adoption executed by the father of the boy.

Where the adopted son belongs to the same gotra as the adoptive father, the performance of *Datta Homam* is not necessary to the legal validity of an adoption among Brahmins in Maharashtra, *Valubhai* v. *Govind Kashinath*5 and *Atma Ram* v. *Madho Rao* 6, *Steele's Law and Custom*, p.46. The same conclusion has been arrived at by the Mad. High Court in *Singamma* v. *Ramanujacharlu* 7 and *Govinda Aiyar* v. *Dorasami* 8. Mere giving and taking were sufficient and no *datta homam* was necessary. The first constituted the legal ceremony, while the latter was a religious act. West and Buhler's Hindu Law, 3rd Edn. P. 922. Where there is a change of the *gotra* by the adoption *Datta Homam* may be necessary. It is not necessary among Sudras who have no *gotras*. Strange,

1 (1881) I. L. R. 14 I. A. 11; I. L. R. 11 Bom. 620.
2 (1880) L. R. 5 A. C. 685, 697.
3. (1888) L. R. 15 I. A. 119.
4. (1866) 7 B. H. C. R. App. 1.
5. (1889) I. L. R. 24 Bom. 218.
6 (1884) I. L. R. 6 All. 276.
7. (1868) 4 Mad. H. C. R. 165.
8. (1887) I. L. R. 11 Mad. 5.

H. L., Vol. I, P. 96 ; Vol. II, p. 89, 104 and 218. For the definition of *gotras* See *Ramachandra Martanda Waikar* v. *Vinayak Venkatesh Kothekar* [1]. Mit. Ch. II S. 5.

Reference was also made to *Emperor* v. *Tilak* [2], *Bayabai* v. *Ramakant* [3], *Abdool Hossain Zainul Abdin* v. *Charles Agnew Turner* [4], *Ganga Narain Gupta* v. *Tilakram Chowdhri* [5], Sarkar's Hindu Law (2nd Edition) P. 67, Colebrooke's Digest. Stokes Hindu Law Books P. 446, note I; Vyavastha, Chandrika, Vol. II, pp. 79, 455, 456, S. B. E., Vol. 2, p. 127.

Sir Robert Finlay, K. C., DeGruyther K. C. Lowndes, for the 1st respondent. The Judges of the High Court did not base their judgments on purely oral testimony. The appellant's story was disbelieved on the strength of the documents.

[*Lord Shaw* referred to S. 145 Indian Evidence Act.]

The objection should have been taken when the documents were used for the first time. It is now too late to raise the objection. The conclusion of the High Court on the question of giving and taking was right. *Datta homam* was essential in the case of Brahmins, though dispensed with in the case of the daughter's son and brother's son being adopted. The Subordinate Judge found that adoption took place on the 27th of June. As a matter of fact no Hindu adoption could take place in a Sikh temple. There are documents to show that no giving and taking on the lap took place with the intention of adoption. Mitakshara, Dattaka Mimamsa and Dattaka Chandrika clearly lay down that *datta homam* is an essential ceremony. Adoption was a religious ceremony and the effect was that the adoptee was cut off from his natural family. No amount of secular proceedings could produce the religious result of removing a son from his father's family. The widow alone could adopt and the result was that she became owner on the death of her son. [*Lord Shaw* : you are entitled to say that in the absence of ceremonials, the proof of adoption must be clearly made out.] She became owner of the property and therefore she was entitled to be supported in her wishes on the question of adoption. In adoption there must be free consent on the part of the adopter. She repudiated her choice, if it was a choice at all, at the first opportunity she got. The

1. (1914) 27 M. L. J. 383. 2. (1903) I. L. R. 28 Bom. 479.
3. (1866) 7 B. H. C. R. Appx. 1. 4. (1887) L. R. 14 I. A. 111, 125.
5. (1888) L. R. 15 I. A. 119, 121.

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judgment of the Madras High Court was founded on Jagannath's Digest and the view of Mr. Ellis; and in Bengal it had not been followed. The case in *Bhairab Nath* v. *Mahesh Chandra*[1] followed in *Syamalal* v. *Sandamini*[2] expressly dissented from Sir Thomas Strange's view. In Bombay there was no authority dispensing with the important religious ceremony of *datta homam*.

[*Lord Shaw*:—We would like to hear what the counsel in support of daughter's claim have to say, but their argument will leave our consideration of the main issue unaffected].

Dunne and *Dr. Majid* for the 2nd respondent.

The consent of all the trustees was not obtained. Nagpurkar clearly dissociated himself from the rest as soon as he discovered the way in which things were conducted. One of them had refused to act. It has been laid down that such an injunction must be strictly followed. A Court has the power to determine a point on appeal if the evidence on record is sufficient.

Reference was made to *Valubai* v. *Govind*[3], West and Bühler (Edn. 1884) P. 1082, 1132. *Singamma* v. *Venkatacharlu*[4], *Ranganayakamma* v. *Alwar Setti*[5], *Govindayyar* v. *Dorasami*[6], *Atmaram* v. *Madho Rao*[7], *Moni Ram Kolita* v. *Kery Kolitany*[8], *Sootsugun Sutputty* v. *Sabitra Dye*[9], *Bhairabnath Sye* v. *Mahes Chandra*[1], *Sayamlal Dutt* v. *Saudamini Dasi*[2], *New Flemming, Spinning and Weaving Co.* v. *Kessowjinath*[10], Strange's Hindu Law, *Beemchurn Seal* v. *Heeralal Seal*[11].

Sir E. Richards in reply.

The Judgment of their Lordships was delivered by

Lord Shaw.—This is an appeal from a decree of the High Court of Judicature at Bombay, dated 23rd September 1910, which reversed the decree of the First Class Subordinate Judge at Poona, dated 31st July 1906.

The main question to be determined on the appeal has reference to the validity of the adoption by the widow of the late Shri Vasudeo Harihar Pandit, alias Shri Baba Maharaj, of a son to her late husband. The appellant Jagannath claims to be the

1. (1870) 4. B. L. R. 162.
2. (1871) 5. B. L. R. 366.
3. (1899) I. L. R. 24 B. 220, 222.
4. (1868) 4 M. H. C. R. 165.
5. (1889) I. L. R. 13 M. 214.
6. (1887) I. L. R. 11 M. 5.
7. (1884) I. L. R. 6 A. 276.
8. (1880) L. R. 7 I. A. 154.
9. (1835) 2 Knapp 29■.
10. (1887) I. L. R. 11 Bom. 393.
11. (1867) 2. Ind. Jur. N. S. 225.

duly adopted son. This claim is resisted by the defendants and forms the issue in the case.

The adoption is challenged substantially upon three grounds—first, that it was never completed in fact. This in argument was reduced to the proposition that the whole transaction had been left at the stage of a proposal to be afterwards carried into effect. As to the adoption itself, it is maintained that there was never a complete giving and taking of the child, and in particular he was not taken upon the lap of the adoptive mother. Secondly that the religious ceremony of *datta homam*, namely, the sacrificial burning of the clarified butter in accordance with the practice of the Hindu religion, was an essential requisite, and was not performed, and that on this ground also the adoption remained inchoate.

These grounds of challenge affect the completion and formalities of the ceremony itself. The third ground, however, is one of general law. There are difficulties on the pleadings and arguments in placing it within any definite category, and to this allusion will afterwards be made. But it may at least be said that almost every known ground of challenge is imported into the case by suggestion. Allegations amounting to or compounded of fraud, circumvention, coercion, and undue influence are all mixed together. The disentangling of these separate and separable grounds of action must undoubtedly have caused certain difficulties in the court below. But the challenge appeared to their Lordships to preserve even at the bar of the Board this mixed or jumbled character.

The facts of the case, briefly stated, are these: The late Baba Maharaj was a first-class Sardar of the Deccan. He died at Poona on 7th August 1897, leaving a young widow, Tai Maharaj.

At the date of his death he made a will appointing five gentlemen as his trustees. One of these, Ranh Sahib, declined to act: the other four obtained probate of the will on 2nd December 1897. These were Messrs. Tilak, Khaparde and Kumbhojkar, the appellants. The fourth, Mr. Nagpurkar, while remaining a trustee, after a time dissociated himself in action from his three colleagues, and was properly convened as a defendant in the suit. The suit itself was brought in defence of the validity of the adoption (the adopted child being, of course, one of the plaintiffs), and for the administration of the estate in terms of the will.

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In the will the clause material to the questions of adoption and succession is as follows:—

"My wife, Saubhagyavati Shri Sakvarbai, is now pregnant. If she does not "give birth to a son, or if the son after birth is short-lived, then, for the purpose of "continuing the name of my family with the *Vichare* of the above-mentioned "gentlemen, a boy should be given as often as may be necessary in adoption on "the lap of my wife in accordance with the *Shastras*, and the above-mentioned "*Panch* should, on behalf of that son, carry on the management of the immovable "and movable estate until he attains majority."

On 18th January 1898, the widow gave birth to a son, but he died within two months thereafter, namely, on the 9th March. The circumstances for giving effect to the testator's intentions by his widow performing an act of adoption thus arose. And it is an admitted fact in the case that for a period of over three years she and the four acting trustees made frequent enquiries and numerous efforts towards the securing of a suitable boy. The circle of relations was considerable, but for various reasons, none of which bear upon the present case, a suitable adoptee could not be found in the Kolhapur or Poona branches of her husband's family.

On the 18th June 1901, a meeting of the trustees was held, at which Tai Maharaj was present, and the facts which were otherwise spoken to by the witnesses are recorded in the minute, the substance of which was that there were no boys available in the Kolhapur family, that of all those available in the Poona family none were approved. The minute in this particular is of importance, because it shows that an anxious search had been made, that deference was paid to the wishes of the widow, and that objection is made to certain suggested adoptees on the ground of their being too old. One boy, the youngest named, of eleven years, being, however, stated to be in point of age suitable, although delicate. The minute then proceeds:—

"The only family which remains, therefore, is that descended from the brother "of Shri Siddeshwar Maharaj at Babre. It is not yet known whether there is a boy "or not in that family. But if there is a boy of that family, fit in point of age, "&c., for adoption, it is our unanimous opinion that one should not be taken "from any other family. And Shri Tai Maharaj is of the same opinion.

"Shri Tai Maharaj suggests that Messrs. Bal Gangadhar Tilak and Ganesh "Shrikrishna Khaparde should both go to Babre, select boys, and return after "settling as regards that family.

"Shri Tai Maharaj should go, see boys, and approve."

It should be mentioned that the trustees were, and had been since the testator's death, duly administering the testator's estate.

What followed upon the proceedings of the 18th June was that Messrs. Tilak and Khaparde accompanied the widow to

Aurungabad, where the widow remained; the two trustees proceeded to Nidhone, a place near the Babre village, and selected five boys within the circle of relationship, and they came back, accompanied by their parents, to Aurangabad. The boys stayed with the widow for several days, being entertained and kept under observation. Certain astrologers, including Durga Shastri, who was one of her suite who had accompanied her to Aurangabad, cast the horoscopes of the children. These proved favourable to the appellant, Jagannath; and her personal likings appeared to point in the same direction.

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All this course of conduct pointed to the entire acquiescence on the part of the widow in the testator's wishes and directions, and so far there is no substantial suggestion to the contrary. As to what happened at Aurangabad it is sufficient to say that, in their Lordships' opinion, the sworn testimony is abundant, is clear, and is overwhelming. It amounts to this. The widow's desire, the arrangement of all parties, and the horoscopes of the astrologers all pointing in one direction, on the 27th June a meeting of the Shastris and of other persons in Aurangabad was summoned. The father of the boy being present, it was announced by the trustees that the boy had been selected. The father was taken to the widow; in pursuance of the familiar procedure she asked him to give her his boy in adoption, and he agreed. The fact of the arrangement was announced to the assembled guests, and there and then duplicate deeds of adoption were drawn up, the one being impressed with a *mogali*, and the other with a British stamp, and both intended to be signed and attested by the widow. This deed was in due form and bore that the father gave the son in adoption. The second document was a letter from the widow addressed to the father and agreeing to take the boy in adoption. So far as giving and receiving of the child these documents were prepared for and pointed to actual adoption in fact.

The preparation of the documents, however, occupied time, and the hour being late the proceedings were stopped, but were resumed early next morning. A gathering was accordingly again held early on the 28th. The deeds of adoption and the letter were duly executed, the boy was given in fact by its natural father to its adopted mother, he was received in fact by her on her lap in performance of the requisite essential in this caste of Hindus

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on occasion of adoption and—all being completed—the formal ceremonies and festivities were postponed, to take place afterwards at Poona, and the widow left Aurangabad.

The Subordinate Judge of Poona has gone into the circumstances with the utmost minuteness and detail, and he has weighed and considered every argument presented, and he comes to the conclusion that the adoption was in fact completed. Notwithstanding the judgment of the learned judges of the High Court of Bombay, their Lordships have no hesitation whatever in entirely agreeing with the judge of first instance. Reference in a little time will be made to the reasons assigned by the High Court for differing from him. But in the meantime it may be said that it appears to their Lordships that, viewed as a matter of evidence, no other conclusion was possible than that come to by the Subordinate Judge.

Their Lordships do not stop to examine the oral testimony in detail. It is really all one way. Upon the crucial question of whether the boy was received by being taken on the lap of the adoptive mother there can be no doubt. Witness after witness speaks of it. It would be very strange if it had not taken place, because it is conceded that it is among the very elements of the ceremonial of adoption, and entirely familiar. It is not only that Hindus of various classes were present and saw it, but it has to be borne in mind what the nature of the challenge of the transaction now is. It has come to be one in which the trustees, men of high position, and some of them of learning and legal training are accused of conspiring by fraud, duress, undue influence, and nearly everything that is improper, to have procured from the widow this act of adoption. It is not to be believed that if such a scheme were afoot, if deeds had been signed, horoscopes taken, and meetings gathered, the scheme would have failed because of the omission of that which was elementary to the knowledge of everybody, namely, the taking of the child upon the mother's lap.

It must, however, be borne in mind that against a body of evidence of 10 or 12 witnesses, 5 witnesses are produced for the defendants. It is sufficient to say of this evidence that most of it was entirely irrelevant to any issue in the case, and such of it as was not was disbelieved by the judge of first instance, a verdict with which the High Court saw no ground for interfering.

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It may be added that when the party returned to Poona, Mr. Tilak wrote out a full account of the transaction, which was recorded in the minutes, and the trustees who had not taken part in the mission to Aurangabad were communicated with, to the effect that the adoption was complete. The sworn evidence is entirely in accordance with what has now been stated. Here and there, there are expressions in the letters out of which it may with ingenuity be possible to suggest a doubtful meaning; for instance, that the words "selected" and "decided" refer to something in the future. And it is also undoubtedly true that both the minutes of the trustees, and the letters, date the adoption as the 27th, whereas in point of fact, as has been seen, it began upon the 27th and was concluded on the 28th. But so far as oral evidence goes, their Lorships see no reason to doubt that it represented the truth, and that the fact of adoption was by it proved.

The Subordinate Judge says:

"Here there was a clear direction of the husband to this wife to adopt, the "wife after his death was anxious to carry out the direction. There is no evidence "to prove that any effort or cajolery was practised upon her, or that there was any "suppression or concealment of facts from her; the plaintiffs had no personal "interest whatever."

In another passage of his judgment he remarks:

"The evidence clearly shows, and it is undisputed that on the 27th there was "selection and verbal gift, and acceptance, and preparation of necessary documents. "On the 28th there was execution of documents under corporeal acts of giving "and taking."

In their Lordships' view these conclusions are well justified.

It is an admitted fact in the case that neither the trustees nor any of the witnesses for the plaintiffs had any interest whatsoever in the subject-matter of the suit, and that no motive can be reasonably suggested for them maintaining or testifying that the adoption of the boy mentioned was made, except that this represented the actual truth which occurred.

It is in these circumstances that their Lordships have viewed with surprise the charge which is made not only against the trustees, but against the whole body of the plaintiffs' witnesses, 10 or 12 persons in all

"The account unquestionably, to my mind,"

says Mr. Justice Chandavarkar,

"given by the witnesses appears to be a true account of many of the series of "events, and a false account of at least one, and that the most important."

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This event is the taking of the child on the lap. Later on in his judgment he states:

"We are driven to believe that a considerable number of men of good position "have conspired together to give false evidence."

The conclusion thus made is of the most serious character, amounting to a plain judicial finding of conspiracy and of perjury.

Their Lordships will presently refer to one or two circumstances accompanying such a verdict, but meantime they will only observe that they do not think that one word of it is justified by the evidence in the case. Referring to Messrs. Tilak and Khaparde, Mr. Justice Chandavarkar observes that—

"they were men of mature years, of exceptional education and mental qualities, "lawyers and men of affairs of great repute and good standing, and both men of "dominating personality."

Some of the witnesses who gave evidence for the plaintiffs are also persons of considerable standing. It is *a priori* difficult to understand how these men, with no object to gain and no interest to serve, could be supposed to have entered into the conspiracy and committed the perjury which the High Court judgment found. Their Lordships think the conclusion come to by the learned judges to be entirely unwarranted on the facts.

Their Lordships find themselves constrained to observe upon certain procedure in the case, the result of which was to introduce into it large masses of irrelevant matter.

It should be mentioned that, subsequent to the adoption at Aurungabad, the widow, upon returning to Poona and after having been a party to certain communications naturally following the adoption which had been made, fell under other influences, and in the month of July expressed a change of mind. And on the 19th August she went through the form of another adoption, *viz.*, of Bala Maharaj—a married man older than herself—as her son. It is unnecessary to make any observations upon his claim. The widow, who, while she was a litigant, maintained that adoption, died on 30th September 1903. Her daughter who was, on her death, admitted to the suit as defendant, challenges not only the first adoption, but the second adoption also—her interest being to maintain that the provisions of the testator's will with regard to adoption had failed that the widow became the owner of the estate as heiress to her infant son who died, and that the property passes in this way to her heir.

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It appears that the widow and Bala Maharaj left no stone unturned in the way of litigation. In July proceedings were begun to revoke the probate granted to the trustees, and subsequently criminal proceedings were instituted in respect of perjury. Their Lordships regret to observe that not only are the circumstances with regard to the criminal proceedings referred to in the present litigation by the parties, but that the depositions therein become matter apparently of materiality in the judgment of the learned judges of the High Court.

In the opinion of the Board this was an irregularity of a somewhat serious character. They refer particularly to the depositions in the criminal case, which seem to have been imported in bulk into the present. There is a risk by such procedure of justice being perverted. A civil cause must be conducted in the ordinary and regular way, and judged of by the evidence led therein. Under S. 33 of the Indian Evidence Act, 1872, evidence given by a witness in a judicial proceeding in a criminal trial is relevant for the purpose of proving in a subsequent proceeding the truth of the fact which it states, but this only, as the section proceeds—

"when the witness is dead, or cannot be found, or is incapable of giving evidence, "or is kept out of the way, &c."

Not one of these circumstances was proved in the present case, and the depositions could not have been used with propriety even to support the evidence of the plaintiffs, which they appear to have done. But there appears to have been no warrant whatsoever for using them for the purpose of either contradicting or discounting the evidence of the witnesses, given in this suit, unless the particular matter or point had been placed before the witness as one for explanation in view of its discrepancy with the evidence then being tendered. It was stated to their Lordships that the prosecution for perjury had in the end completely failed. With that their Lordships have nothing to do. The judgment now given is pronounced irrespective of the result of the criminal suit. Successful or unsuccessful, the introduction and use in this civil action of these criminal proceedings, as above described, were illegitimate.

A further mischance in point of procedure must now be mentioned. As already stated, the testimony of the plaintiffs' witnesses is not contradicted orally, and is internally a consistent

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body of evidence. But various minutes and documents are the subject of minute analysis, observation, and comment by the learned judges of the High Court with a view to rebutting it. Their Lordships think it right to observe that in view of the serious nature of the verdict of the High Court, they have considered it within their province themselves to peruse the documents. Having done so, they are of the opinion that, taken together, they completely confirm the case made in the witness-box, and that there is no ground, in fact, for the conclusion that they either contradict the testimony or cast any reasonable doubt upon it.

But they must also record their dissent from the view that the use made of these documents in this case was justified by law. On general principles it would appear to be sound that if a witness is under cross-examination on oath he should be given the opportunity, if documents are to be used against him, to tender his explanation and to clear up the particular point of ambiguity or dispute. This is a general, salutary, and intelligible rule, and where a witness's reputation and character are at stake the duty of enforcing this rule would appear to be singularly clear.

Fortunately the law of India pronounces no uncertain sound upon the same matter By section 145 of the Indian Evidence Act, 1872, it is provided that—

"A witness may be cross-examined as to previous statements made by him in "writing or reduced into writing and relevant to the matters in question without "such writing being shown to him or being proved; but if it is intended to contra- "dict him by the writing his attention must, before the writing can be proved, be "called to those parts of it which are to be used for the purpose of contradicting "him."

Their Lordships have observed with regret and with surprise that the general principle and the specific statutory provisions have not been followed. The verdict of the High Court is an inferential verdict—none the less sweeping on that account—but an inferential verdict actually of perjury. What are the premises upon which this inference proceeds? In no inconsiderable degree they consist of documents, statements, even turns of expression, which are used to confound the spoken word. Had the safeguards set up by the law with respect to the use of documents been observed? Not at all. Not only have documents been used for the purpose of contradicting witnesses without obeying the injunctions prescribed by law, but the inference thus derived, and

improperly derived, from these documents has resulted, as stated, in an inferential verdict of perjury.

Heaton, J., deals elaborately with this portion of the case, and one example taken from his judgment will suffice. One letter out of many is taken, passages are cited from it, and a minute argument proceeds as to the expressions used, and why this was mentioned and that other omitted. Mr. Tilak was for five days under cross-examination before the Subordinate Judge; but not one of these things was put to him; and he was not asked in the witness-box to give one single explanation with regard to any of those expressions or omissions which are now alleged to compromise him. On this point of the case no more need be said.

One other matter of procedure may be mentioned. One of the trustees, Mr. Nagpurkar, dissociated himself from his colleagues, and in July appears to have written a minute of doubt or dissent with regard to certain proceedings. A letter from him resiling from this position is also produced.

The learned Judges have come to a conclusion which would be in some respect in accord with the so-called dissent. It is a striking circumstance that Mr. Nagpurkar, a relevant witness, intimately acquainted with what had gone on, and with the position both of the trustees and widow as regards adoption, and a party in the case aware of the charges launched against his colleagues, does not appear as a witness to explain the one or to support the other.

In result, their Lordships are unable to agree with the view taken by the High Court on this part of the case.

The next argument is that the adoption was void because it lacked the ceremonial of *datta homam*, which ceremonial is declared to be essential to its legal validity.

Datta homam, is the service of the burning of clarified butter, which is offered as a sacrifice by fire by way of religious propitiation or oblation. It is admitted that in this case the ceremony was not performed, and it seems to be fairly clear that it was one of those things which it was intended afterwards to carry out at Poona as part of the general ceremonial and festivities which were to be carried through there.

In certain circumstances the point might be the subject of a prolonged and very conflicting argument, as the authorities

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ancient and modern, are not in accord on the point as to whether this is a legal as well as a religious requisite. There is a danger, on the one hand, of not paying due respect to those religious rites which are observed and followed among large classes of Indian belief, while, on the other hand, the danger must also be avoided of carrying these—except when the law is clear—into the legal sphere, so as to affect or impair personal or patrimonial rights. The subject of the requisites for adoption has, in recent years, been the matter of not infrequent consideration by this Board, and their Lordships refer, in especial, to the elaborate examinations of the authorities made by Lord Hobhouse in *Sri Balusu Gurulingaswami* v. *Sri Balusu Ramalakshmamma,* [1] and by Mr. Ameer Ali in *Ramachandra Martand Waikar* v. *Vinayak Venkatesh Kothekar* [2].

The former case had reference to the validity of the adoption of an only son. From the religious point of view this is, in many writings of great authority, forbidden. There was, however, in India, considerable difference in the view as to whether the religious and legal injunctions on the subject were co-extensive. It must be admitted that if one has recourse to the ancient writings when Brahminical influence was most predominant one finds the ceremonial part of adoption the subject of highly elaborate detail; and it is beyond all question that in the course of ages many of these details have disappeared as essentials within the legal sphere. As Lord Hobhouse observes:

> "The further study of the subject necessary for the decision of these appeals "has still more impressed them with the necessity of great caution in interpreting "books of mixed religion, morality, and law, lest foreign lawyers, accustomed to "treat as law what they found in authoritative books, and to administer a fixed "legal system, should too hastily, take for strict law precepts which are meant to "appeal to the moral sense and should thus fetter individual judgments in private affairs, should introduce restrictions into Hindu society, and impart to it "an inflexible rigidity never contemplated by the original law-givers."

The case resulted in the decision that the adoption of an only son is not null and void under the Hindu law.

The question whether the *datta homam* is a legal requisite in Bombay for adoption among the three twice-born classes does not, however, in the view of their Lordships, broadly arise in the present case. It is in no way necessary to canvass or call in question any dicta upon that general point, nor does the question

1. (1899) L. R. 26 I. A. 113, 126 s. c. 9 M. L. J. 67.
2. (1914) L. R. 41 I. A. 300, s. c. 27 M. L. J. 333.

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arise whether, for instance, the principle extends to India at large of the decision of the Madras Full Bench in *Govindayyar* v. *Dorasami* [1] or of the Madras High Court in *Singamma* v. *Venkatacharlu* [2] both decisions being of value as containing a careful study of the authorities, and affirming that the ceremony of *datta homam* is not essential to a valid adoption among Brahmins in Southern India.

For in the opinion of the Board the necessity does not arise where the child to be adopted belongs to the same *gotra* as that of the adoptive father. It is an admitted fact that this was so in the present case. And their Lordships have come clearly to the conclusion that where this is so in fact then the Law of India is that the celebration of the ceremony of *datta homam* is not an essential to the legal validity of an adoption. It is conceded in argument that certain exceptions to the alleged general rule do exist, but it is maintained that these exceptions are limited to the case of the adoption of a nephew, or of a daughter's son. In decided cases, this may have been the relationship in fact, but the principle of all the decisions, and in their Lordship's opinion, of all the authorites, is that within the same *gotra* the ceremony is unnecessary. They agree with what, in their opinion, is the full and careful judgment of Chief Justice Jenkins, in the case of *Valubai* v. *Govind Kashinath*, [3] the decision being to the effect that among Brahmins in the Presidency of Bombay, the performance of the *datta homam* ceremony is not essential to the validity of the adoption of a brother's son. An examination of the judgment shows that it was not based upon the narrow particular degree of relationship but upon the broad ground of the identity of *gotra*.

Mr. Colebrook's annotation upon Mitakshara 25, is as follows :—

" *Gotraja* or persons belonging to the same general family (*gotra*) distinguish-
" ed by a common name, these answer nearly to the gentiles of the Roman law."

A good illustration of the point has reference to the law applicable to the Sudra caste. The use of the *datta homam* is not necessary for adoption within that caste, and why ? The explanation is given in a sentence by Strange in his "Hindu Law," volume 2, in which it is laid down that—

1. (1887) I. L. R. 11 M. 5. 2. (1868) 4 M. H. C. R. 165.
3. (1899) I. L. R. 24 B. 213.

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"Ceremonial adoption cannot be necessary in the case of a Sudra, since by "the *datta homam* the adopted son is offered from the stock (*gotram*) of the "natural to that of his adopted father ; and Sudras have no *gotra*."

It may be added that in the treatment in the same volume, page 104, of the celebration of the Upanayana rite, or the investitude with the sacred thread, this is laid down :

"With respect to the non-eligibility of a person for adoption on whom the "Upanayana rites have been performed, it is much disputed. The more reasonable opinion would appear to be that he is eligible if of the same *gotra* (family) ; "non-eligible if of a different *gotra* from the adopter ; that if of the same *gotra* "the *datta homam*, though proper, is not necessary."

Their Lordships do not pursue the investigation of the authorities further, adopting, as they do, the survey made in the last-mentioned judgment of the learned Chief Justice Jenkins.

In their opinion accordingly this part of the respondents' case also fails.

What remains is the attack which was made upon the transaction of the adoption itself, an attack in which the various grounds of rescission applicable to contracts in general were alluded to. Their Lordships hold that it is impossible to discover what it is that is really put forward by the defendants. Under the contract law of India, as well as by ordinary principles, coercion, undue influence, fraud, and misrepresentation, are all separate and separable categories in law. It is true that they may overlap or may be me combined. But in the present case it is impossible to discover what ground or grounds are really taken up. There is a well-known rule of pleadings expressed in the frequently quoted language of Lord Selborne in *Wallingford* v. *Mutual Society* [1] that—

"With regard to fraud if there be any principle which is perfectly well settled, "it is that general allegations, however strong may be the words in which they are "stated, are insufficient even to amount to an averment of fraud of which any "court ought to take notice."

The law of India is in no way different from this, and it has been decided over and over again, *e.g.*, in *Gunga Narain Gupta* v. *Tiluckram Chowdhry* [2].

It is, in their Lordships' opinion, much to be regretted that the rule is not more strictly observed, and their Lordships are of opinion that in the present case much confusion and contention have been caused, together with much expense to the parties, in consequence of its neglect. No definite issue upon any

1. (1880) 5 A. C. 685 at 697. 2. (1888) L. R. 15 I. A. 119.

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one of the well-known categories of attack was settled for trial, the only issue on the subject being—Whether the plaintiff, No. 4, is a validly-adopted son of Bala Maharaj. From time to time in the course of this case, it is clear that specific pleadings in Indian procedure have been abandoned altogether. In short, several of the careful prescriptions of the law and of the Legislature, all of which were intended to bring litigation within definite compass and to make articulate and clear the points of difference between the parties have been lost sight of. Their Lordships, however, are unwilling, confused though the charges be, to dismiss this part of the case on such a ground.

The position upon the facts was this: The will of the testator prescribing an adoption was clear; the wish of the widow and the trustees, alike to follow it was clear; the trustees, so long as the testator's wishes were carried into effect, had no interest of any kind as to who the adoptee should be. It was also clear that the testator's will indicated that a minor should be adopted, because express provision was made for the management of the estate till that minor should come of age. It was manifest that every consideration pointed to the advantage of keeping, if possible, within the *gotra*, and it was further clear that the trustees, in advising the widow, should pay due regard to her wishes, and that, so far as this could be accomplished, they and she should act together.

It is in these circumstances a strange situation that the adoption should be challenged upon the ground, nebulously stated as it is, of fraud. There is no evidence, says the Subordinate Judge, to prove that any fraud or cajolery was practised upon her; that there was any suppression or concealment of facts from her. With this judgment it does not appear that the High Court differs, and their Lordships entirely agree with it. It was for some reason, however, held that the general issue above quoted did include allegations of coercion and undue influence. Coercion is by admission out of the case. There was nothing of the sort; and this is not now maintained. What remains accordingly is the judgment of the High Court to this effect that—

"The question here is difficult, she was indeed willing to adopt, but was she "a free agent when she adopted the fourth plaintiff, assuming that she adopted "him, or was she forced into it against her will by unconscientious means used by "the first two plaintiffs, that is, Messrs. Tilak and Khaparde, and unfair ad- "vantage taken by them of her ignorance and youth, and of other fiduciary re- "lations between them."

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The citation just made is from the notes of Mr. Justice Chandavarkar. With much respect to the learned judge, it is, notwithstanding the protracted argument before their Lordships, even now somewhat difficult to gather what are the legal categories under which the attack upon this transaction is made. Unconscientious means are mentioned and unfair advantage is mentioned It is needless to ask whether this implies fraud because their Lordships are of opinion that no sort of unconscientious means was employed by these trustees from beginning to end of the transaction, and that no unfair advantage was either taken or meant throughout their whole course. It is true that the adoptive mother was a young widow, probably easily guided, and that the trustees are admitted to have been men of great influence and strong personality, but their Lordships are of opinion that these were used in no respect unduly, but with propriety and entirely in the interests of the proper administration of the estate. Their Lordships cannot approve of the idea that in India the law would make the possession of reputation or high standing an element of suspicion. If it were so, then the result in India would be to import *pro tanto* a disqualification and disability into the position of reputable men.

A reference is made in the Court of Appeal to the fiduciary relations in which the trustees stood to the widow, and in one part of the judgment impropriety of conduct upon the part of the trustees is alleged to lie in this, that they failed in their duty of informing her as to her rights. Upon inquiry as to what was meant by this, their Lordships were informed that the reference was to this effect, that if the widow had failed to adopt, then by doing so she would herself have come into the position of being heiress to her infant deceased child. The meaning of this is accordingly as follows:—Among Hindus the ceremony of adoption is held to be necessary not only for the continuation of the line of the childless father, but as part of the religious means whereby a son can be provided who will make those oblations and religious sacrifices which would permit of the soul of the deceased passing from Hades into Paradise.

The widow in the present case is said to have been injured because she had not been informed that she could win for herself his temporal estate, by violation of her husband's dying wishes, and at the price of sacrificing his souls' happiness. Their Lordships are not of opinion that it was any part of the duty of the

trustees to suggest this infamous alternative to her mind. Their duty was to give effect to his wishes, and his wishes were in accord with the religious belief of Hindus in regard to adoption. It is to be recorded further that the widow herself did not put forward, during her life, any plea or suggestion of this sort; she was as anxious as the trustees that an adoption should be made.

Only a word need be said as to the argument put forward on behalf of the daughter, that neither the first nor second adoption was valid. The only separate point put forward was to the effect that the trustees' consent had not been unanimous, one trustee out of five having declined to act. In their Lordships' opinion, his consent in these circumstances was not required. Of the acting trustees it was said that one, Nagpurkar, dissented. Whether he did so or not, the question would remain as to the action of the majority of the trustees; but in their Lordships' opinion that question does not arise; because he did in fact not dissent, but consent. His dissent or alleged dissent, was subsequently made under circumstances in which it is not necessary to inquire.

Their Lordships will humbly advise His Majesty that the appeal should be allowed, the decree of the High Court set aside, and the decree of the Subordinate Judge restored. The appellants will have their costs here and in the Courts below.

Solicitors for Appellants: *Downer & Johnson.*

Solicitors for Respondents: *T. L. Wilson & Co., and Edward Dalgado.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present.—Mr. Justice Kumaraswami Sastri.

Sri Poosapathi Ramachandra Raju Garu ...	*Petitioner* (2nd Defendant.)*
v.	
Sri Rajah Vachavayi Venkata Subbayamma Jagapathi Bahadur Garu and others.	*Respondents (Plaintiffs and Defendants Nos. 1 & 3 to 5.*

Practice—Pleadings, amendment of—Inconsistent or alternative claim, after all the evidence is closed—Power of Courts to allow—Civil Procedure Code, S. 115—High Courts Act, S. 15—Revision—Interference, where another remedy exists.

Where in a suit brought for enforcing the terms of a contract on the basis that it was a valid and subsisting contract, after the case was closed and the arguments almost over the Court directed the defendants to file an additional written statement to meet a case based on the impossibility of performance of the contract, raised in the course of the plaintiff's pleader's arguments in reply.

Held: that the procedure adopted was wholly irregular.

* C. R. P. No. 14 of 1915. 29th April, 1915.

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Kumaraswami Sastri, J.

The proper course for the Court to adopt was to direct the plaintiff to apply for leave to amend his plaint, then to see whether there were grounds for such amendment, and on such amendment being made to call for a further written statement, to raise an issue on the same and proceed to try it.

The High Court can interfere in revision with interlocutory orders of Subordinate Courts, where patent irregularities in procedure are brought to its notice.

The power of superintendence of the High Court under S. 15 of the Charter Act and the powers given by S. 115 Civil Procedure Code, are intended to give the High Court jurisdiction to see that the proceedings before the lower Courts are properly conducted and the High Court should not refuse to set right matters, if by doing so, it would save unnecessary expense or delay or multiplicity of proceedings.

Petition under S. 115 of Act V of 1908 and S. 15 of the Charter Act praying the High Court to revise the order of the Court of the Temporary Subordinate Judge of Vizagapatam in O. S. 10 of 1913.

T. R. Ramachandra Aiyar, and *T. R. Krishnaswami Aiyar*, for petitioner.

P. Narayana Murthi (with him D. Appa Rao T. Ramachandra Rao, and *B. Somayya)* for Respondents.

The Court delivered the following

Judgment:—This is a petition filed by the 2nd defendant to revise the order of the Subordinate Judge of Vizagapatam in O.S. No. 10 of 1913 wherein he held that the plaintiff was entitled to claim an alternative relief not claimed in the plaint as filed and directed the defendants, after the case was closed and arguments almost over, to file an additional written statement without requiring an amendment of the plaint. O. S. No. 10 of 1913 was filed by the widow of the Rajah of Tuni against the defendants to enforce the terms of an agreement entered into with her husband (who financed the litigation in connection with the Vizianagaram Estate) whereby the plaintiff's husband was entitled to a certain share in the decree that may be passed in the Vizianagaram suit either after contest or on compromise. The whole plaint proceeded upon the footing that there was a subsisting, valid and enforceable contract between the parties under the terms of which the plaintiff was entitled to the relief claimed. Paragraph 35 of the plaint sets out that out of the properties secured by the compromise decree between some of the defendants and the Rajah of Vizianagaram the plaintiff was entitled to Rs. 1,58,629 and also to certain shares in the annuity and the house given to defendants 2, 5 and 6. Paragraph 37 of the plaint sets out the details. There is not a word in the plaint as to the contract having become void or impossible of

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performance, as to the plaintiff being entitled to any relief under S. 65 of the Contract Act. Upon this plaint, written statements were filed and various defences were raised. For the purpose of this petition, it is sufficient to refer to two of them. The first defence was that the plaintiff's husband committed a breach of contract and wrongly refused to finance the suit and that consequently he was not entitled to any share in the decree amount as provided for by the agreement. In paragraph 25 of the written statement the defendants also stated that the plaintiff was not even entitled to a refund of the money actually advanced as her husband wrongly discontinued to make payments which he was bound to make under the agreement. It is also contended that the contract being indivisible and not being in the nature of a loan intended to be repaid, a mere part performance by the plaintiff's husband would not entitle her to any relief whatever even in respect of the part performed by her husband. It is clear from the pleadings that the case, that the contract had become void or become impossible of performance and that consequently plaintiff was entitled to a return of the money actually advanced under the provisions of S. 65 of the Contract Act, was never raised or was in the contemplation of the parties. Upon these pleadings issues were settled and one of the issues was whether the suit agreement provided for the contingency that actually happened ; if not, what is the plaintiff's remedy. I find it difficult to see how having regard to the pleadings and the issues which were presumably settled with reference to the allegations therein, this issue can be said to cover the question as to whether the contract had become void or impossible of performance and whether by reason thereof the plaintiff was entitled under S. 65 of the Contract Act to the recovery of the amount actually advanced.

Mr. T. R. Ramachandra Iyer, who appeared for the defendants in the Lower Court, states that till he commenced his arguments after plaintiff's Vakil closed his and after all the evidence was taken, neither the Judge nor the parties had the remotest idea that a claim was being made on the footing that the contract had become void or impossible of performance and that the 7th issue above referred to was intended to cover such a claim. Though the practice has been discountenanced by the High Court the Subordinate Judge asked the parties to file written arguments and written arguments were presented by the plaintiff and defendants,

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In the written arguments of the plaintiff the contention that the contract had become void or impossible of performance was never raised by her Vakil. When the defendants' Vakil began his reply. he argued that the plaintiff was entitled to no relief under the contract because the compromise was not one effected in pursuance of the terms of the contract since both the persons whose consent was necessary before the compromise could be legally effected, namely, plaintiff's husband and the late Hon'ble Mr. V. Krisnaswami Iyer were dead at the date of the compromise. After Mr. T. R. Ramachandra Ayyar closed his arguments, plaintiff's Vakil in reply suggested that, even if the contract was void, the plaintiff would be entitled under S. 65 of the Contract Act to a return of the money actually advanced. The Subordinate Judge at this stage of the proceedings was of opinion that the contention put forward in reply by the plaintiff's vakil was one which was raised in the pleadings and that the plaintiff was entitled to a relief on this ground. He gave the defendants leave to file an additional written statement and allow both parties to adduce evidence on the question.

It seems to me that the procedure adopted by the Subordinate Judge is. to say the least of it, opposed to all rules of practice and procedure. The plaintiff came to Court with an allegation that the contract was a subsisting and enforceable contract and that she was entitled to a certain share in the amount decreed by the compromise decree in the Vizianagaram suit.

There was not a whisper anywhere that she was entitled to any alternative relief. It is clear that till Mr. Ramachandra Aiyar began his arguments after all the evidence was closed on both sides, nobody even thought that such a claim was going to be put forward or was intended to be made. The Subordinate Judge seems to have thought that, because an argument was put forward by the plaintiff's vakil in reply to the arguments of the defendants' vakil which by some stretch of language might be brought under one of the issues raised in the pleadings, it was open to him to call on the defendants to file an additional written statment in the absence of any amendment to the plaint. Assuming that the argument of the plaintiff's vakil in reply amounts to a statement made by him that his client wanted to raise an alternative ground that the contract was void and therefore she was entitled to the benefit of the amount actually advanced, the

proper course for the Judge would be to direct the plaintiff to amend her plaint by setting forth clearly the alternative relief which she seeks and the grounds on which she seeks it and after the amendment has been made to allow the defendant to file an additional written statement, and to decide first of all as to whether the amendment ought to be allowed and if allowed, to raise additional issues and post the matter for further evidence.

O. VI R. 7 C. P. C. enacts that no pleading shall except by way of amendment, raise any new ground of claim or contain any allegation of fact inconsistent with the previous pleadings of the party pleading the same. There can be little doubt that a claim on the footing that the contract is void, is certainly a new ground in a suit filed to enforce the terms of the contract. It does not follow from the statements made in the plaint that the contract is not subsisting, and is not enforceable. It seems to me that the Court has no jurisdiction to direct the defendants to file an additional written statement to meet allegations not contained in the plaint and which could, by no stretch of imagination, be held to be covered by the allegations in the plaint. The difficulty was pointed out by the 2nd defendant in his additional written statement which he filed pursuant to the order of the Court. In paragraph 2, he states that the plaintiff is entitled to no relief under S. 64 of the Contract Act as she did not ask for it in the plaint and that, having regard to the fact that no amendment of the plaint was asked for, the defendant had considerable difficulty in knowing what particular case he had to meet. One would have thought that these objections were perfectly reasonable. The Subordinate Judge on reading the written statement expunged the paragraphs on the ground that they were prolix and unnecessary. The position, therefore, is, the Judge has, without any allegations being made in the plaint, resolved to proceed with the case on the footing that the plaintiff claimed an alternative relief and directed the defendants to file an additional written statement stating their objections to the cause of action not set out in the plaint. He pressed into service an issue which neither party ever thought covered the question and proceeded with the trial. Such a procedure, is, in my opinion, not only unwarranted, but likely to prejudice the defendants. It is not open to the plaintiff who has not amended the plaint, or set out the specific facts and grounds under which she claims the alternative relief to

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go on adding to her contentions orally as arguments in the suit proceeded on the merits. I have come to the conclusion that the procedure adopted by the Subordinate Judge is irregular and likely to prejudice the defendants. I do not wish it to be understood that the Subordinate Judge has no power to grant an amendment. Cases have been quoted where parties have been allowed to amend the plaint by asking for alternative reliefs, and when the plaintiff has amended the plaint setting out the reasons for asking for same, the Subordinate Judge might well grant the amendment on such terms as to costs or otherwise as he may think necessary.

It has been argued by the vakil for the respondents that, even if there was an irregularity, the procedure of the Subordinate Judge is one which may be remedied in the appeal against the final decree that may be passed by the Subordinate Judge and that the High Court ought not to interfere in revision. This raises the question of the power of the High Court to interfere in revision under S. 115 C. P. C. and S. 15 of the Charter Act. S. 115 C.P. C. empowers the High Court to call for any case which has been decided by any Court subordinate to such High Court and in which no appeal lies thereto and if such Subordinate Court appears to have failed to exercise a jurisdiction not vested in it by law, or to have failed to exercise a jurisdiction so vested, or to have acted in the exercise of its jurisdiction illegally or with material irregularity, to make such order in the case as it thinks fit. S. 15 of the Charter Act gives the High Court superintendence over all the Courts subject to its appellate jurisdiction.

My attention has been called to cases in some of which High Courts have interfered and in some of which they have declined. For the petitioner reference has been made to several cases. In *Veerabadran Chetti* v. *Nataraja Desikar* [1] it was held that the High Court had under S. 15 of the Charter Act power to set aside the order of a Subordinate Judge refusing to grant a commission. A similar view was taken in *Somasundaram Chettiar* v. *Manikka Vasaka Desika Gnana Sammanda Pandara Sannadhi* [2]. In *Nagaraja Pillai* v. *Vythinatha Ayar* [3] it was held that S. 15 of the Charter Act is sufficiently wide to empower the High Court to interfere even though the case may not fall under S. 115 C.P.C.

1. (1904) I. L. R. 28 M. 28. 2. (1907) I. L. R. 31 M. 40.
3. (1911) 21 M. L. J. 484.

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In *Subramania Pattar* v. *Narayana Pattar* [1] Mr. Justice Seshagiri Aiyar was disposed to give a more liberal interpretation to the powers of the High Court under S. 115 C.P.C. In *Venkatachallam Pillai* v. *Parasa Pattar* [2] Mr. Justice Oldfield was of opinion that errors of law, or procedure may be set right by the High Court under S. 115 C.P.C.

The judgment of Justice Mukerjee in *Rai Yathendramall* v. *Hari Charan* [3] refers to several decisions of the Calcutta High Court and supports the view that a more liberal interpretation ought to be given to the powers of the High Court both under S. 115 of the Civil Procedure Code and S. 15 of the Charter Act, and that in exceptional cases the High Court has power to interfere and set matters right by the reversal of interlocutory orders. In the particular cases the order of the Subordinate Judge directing the trial of certain issues before evidence being let in was set aside. For the respondent, reference has been made to cases where the High Court declined to interfere. In *Devata Sreerama Moorty* v. *Sree K. Venkata Seetarama Chandra Rao* [4] Justices Sadasiva Iyer and Spencer held that the Court could not interfere in revision when the aggrieved party has a remedy by suit and doubted the correctness of the decision in *Rudrappa* v. *Narasinga Rao* [5] and in *Venkatasubbiah* v. *Seshachellam* [6] it was held that the Court will not interfere under S. 115 of the Civil Procedure Code with an order refusing an amendment even though the order was erroneous. In *Chidambaram Chetti* v. *Nagappa Chetti* [7], the court refused to interfere under S. 115 as the aggrieved party had a remedy by way of appeal. A similar view was taken by Justice Sadasiva Aiyar in *Jagannatha Mudaly* v. *Appasami Mudaly* [8], and *Gaeble* v. *Ramayi* [9].

It is difficult to reconcile all the observations made by the learned Judges who took part in the cases above referred to. In case of discretionary powers vested in Courts, I do not think any hard and fast rules can be laid down so as to fetter that discretion in advance in all cases that may arise in future. The observations of Jenkins, C. J., in *In re an Attorney* [10], that a discretion given in the widest terms by the legislature ought not to be crystallised or restricted by a series of cases but should remain "free and

1. (1915) 2 L. W. 230. 2. (1914 M. W. N. 614. s.c. 16 M. L. T. 156.
3. (1915) 20 C. L. J. 426. 4. 1914 M. W. N. 95.
5. (1904) I. L. R. 29 B 213. 6. (1911) 22 M. L. J. 136.
7. (1912) 24 M. L. J. 73. 8. (1914) 1 L. W. 233.
9. (1914) 1 L. W. 282 : 24 I. C. 781. 10. (1914) I. L. R. 41 C. 446.

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untrammelled to be fairly exercised according to the exigencies of each case," may well be borne in mind. It seems to me that the power of superintendence and the powers given by S. 115 were intended to give the High Court jurisdiction to see that the proceedings before Lower Courts were properly conducted, and I see no reason why the High Court should refuse to set right matters if by doing so, it would save unnecessary expense or delay or a multiplicity of proceedings. There may be a right of appeal but it may be unnecessary to drive a party to the expense and trouble of an appeal by timely interference. Speaking for myself it seems to me that grave injustice might occur in particular cases if the High Court should decline to interfere where patent irregularities in procedure are brought to its notice and should leave the suit to take, what is in its opinion a wrong course, simply on the ground that after all the mischief has been done, the Court can remedy the evil by its appellate judgment. While on the one hand Courts will not generally interfere in revision where an equally efficacious remedy is open to the party by way of appeal, the Court, on the other hand, has to be satisfied that having regard to the facts of each particular case, the remedy by way of appeal would give the party as complete and efficacious a relief as interference at the stage when the High Court has become aware that the lower Court has acted in the exercise of its jurisdiction illegally or with material irregularity.

I set aside the order of the Sub-Judge and direct that he proceed with the suit on the lines indicated by me above. He will first direct the plaintiff to amend the plaint as advised, then decide whether the amendment should be allowed after hearing the defendants, and if he allows the amendment he should direct written statements to be filed on the amended plaint, settle proper issues and proceed with the final disposal.

The respondent should pay the appellant's costs of this Revision Petition. Costs in the lower Court will be at the discretion of the Subordinate Judge.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Spencer and Mr. Justice Coutts-Trotter.

P. Marakkar and five others . . *Petitioners** (*accused*)

Madras Revenue Recovery Act (II *of* 1864) *S.* 8—*Distress—Non-service of demand on absent pattadar—Resistance to distrainer, if an offence—'Pattadar', meaning of.*

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*Orl. R. C. 860 of 1914 Orl. R. P. 707 of 1914. 23rd April 1915.

The Madras Revenue Recovery Act, does not contain any provision requiring the demand in writing described in S 8 to be delivered to the defaulter in person before distress, when the defaulter is absent on the day of distress. The act of the distrainer in those circumstances in distraining without serving the demand on the defaulter is therefore not illegal and resisting the distraint is an offence.

Semble: The "defaulter" referred to in S. 8 of the Act is the person registered as pattadar.

Queen-Empress v. *Ramasami* 1, Referred to.

Petition under Ss. 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the Judgment of the Court of the Sub-Divisional Magistrate of Malappuram in Criminal Appeal No. 59 of 1914 preferred against the Judgment of the Court of the Second Class Magistrate of Tirur in Calendar Case No. 97 of 1914.

K. Pandalai for the Petitioners.

P. R. Grant for the Public Prosecutor.

The Court made the following

Order:—The question is whether the act of the distrainer in this case was legal, so as to make resistance to his act an offence. Dr. Pandalai's main contention is that the only person who can be classed as the 'defaulter' within the meaning of S. 8 of the Madras Act II of 1864, is the person registered as Pattadar, and that the service on the Pattadar, whether present or absent, of a demand in writing, is a condition precedent to making distraint under that Act. Taking for granted the first part of this contention to be correct, the difficulty as to the second is that the Act does not contain any provision requiring in cases where the defaulter is absent at the time of distraining, that the demand in writing described in S. 8, should be delivered to the defaulter before the distress. But it is argued that such a procedure must be assumed to have been intended from the fact that the person liable to pay the arrear is the pattadar and that a production of the demand in his absence would be a meaningless act. In construing the act, we are not inclined to read anything into it which is not expressly stated therein. No provision is made in the Act as to what the distrainer is to do with the written demand in the case of the defaulter not being present when the distrainer arrives on the land, except in the 3rd part of the section which reads thus: "When a defaulter may be absent a copy of the writing, with the endorsement shall be fixed or left at his usual

1. (1893) I. L. R. 16 Mad. 464.

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place of residence, or on the premises where this property may have been distrained, before the expiration of the third day, calculating from the day of the distress." This clearly refers to what is to be done after the distress and is not a condition precedent to making it. The section itself and the Board's Standing Order No. 44 para 7, which deals with the procedure in distraint, declare that the demand in writing is to be the distrainer's authority for making the distress. In the form of the demand, as given in the appendix to the Board's Standing Orders, there is a direction which practically reproduces the words of the section that "the distrainer should "produce this order, and if the sum due be not at once paid, he "may make distress, and on the day on which the property is "distrained he should deliver to the defaulter a copy of the "order endorsing thereon a list of the property distrained and "the name of this place where it is kept." It is obvious "that if the defaulter is not present at the spot, it cannot be shown to him then and there. But the arming of the distrainer with a written demand signed by a duly empowered Revenue officer is an act which serves to distinguish him from a thief or trespasser in the eyes of the tenant or mortgagee in occupation of the land. S. 11 of the same Act provides for a tenant whose crops are attached for an arrear of revenue paying the arrear and deducting the amount from any rent due by him to the pattadar. It thus appears that the production of the written demand is not such a meaningless act, as it might be thought, and that the provision for the delivery on the same day of a copy to the defaulter is only intended to apply when the defaulter is present. The petitioners cannot rely on any omission to furnish the defaulter with a copy of the demand *after* the distraint was made, as an excuse for resisting the distraint. We consider that P. W.-1. when making the distraint in the absence of the pattadar who lived twenty miles away, did all that was required of him by law. The point of law now raised was not decided in *Queen-Empress* v. *Ramasami* [1], which Dr. Pandalai has cited in favour of his contention.

The sentences imposed for the offences committed by the petitioners in defying the authority of the Revenue officers are not in our opinion excessive.

The Criminal revision petition is dismissed.

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1. (1893) I. L. R. 16 M. 364.

PRIVY COUNCIL.

[On appeal from the High Court at Allahabad.]

Present:—Lords Dunedin and Atkinson, Sir George Farwell and Sir John Edge.

Puttu Lal and others ... *Appellants.**

v.

Mussammat Parbati Kunwar and another ... *Respondents.*

P. C.

Puttu Lal v. Mussammat Parbati Kunwar.

Hindu Law—Adoption—Widow adopting her brother's son under authority from her husband—Validity—Test of eligibility—Rule of Nanda Pandita—Subordinate Courts, duty of, to follow rulings of the High Court.

The rule laid down by Nanda Pandita that a widow cannot lawfully adopt her brother's son or grandson is an extension of the rule of Hindu Law that no one can be adopted as a son whose mother the adopter could not have legally married, which is not supported by authority and cannot therefore be regarded as law.

An adoption by the widow is not an adoption to her but one to her deceased husband; the test of eligibility of the adopted son for adoption must, therefore be the test which would have applied had the adoption been made by the husband himself during his life time.

The rule of Hindu Law that a legal marriage must have been possible between the adopter and the mother of the adopted boy only refers to their relationship prior to marriage.

Held, accordingly that where a Hindu widow adopted her brother's son in pursuance of the authority given by her deceased husband, the adoption was valid.

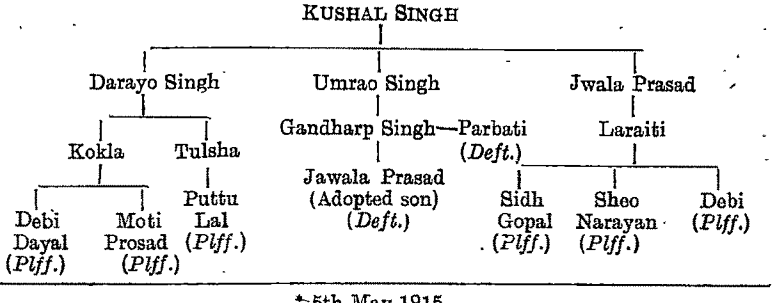
Jai Singh Pal Singh v. *Bijai Singh* [1] approved.

Sri Ramulu v. *Ramayya* [2], *Bai Nani* v. *Chuni Lal* [3], referred to.

The Judge of a Subordinate Court in India is bound to follow the decision in law of a Bench of the High Court to which he is Subordinate unless the decision of the bench has been overruled by a decision of a Full Bench of that Court or by the Privy Council or unless the law has been altered by a subsequent Act of the Legislature.

Appeal from a judgment and decree of the High Court, at Allahabad dated December 15, 1909, reversing a judgment and decree of the Subordinate Judge of Mainpuri, dated May 18, 1908.

The following pedigree will show the relationship of the parties in the suit:—



*5th May 1915.

1. (1905) I. L. R. 27 All. 417.
2. (1881) I. L. R. 3 M. 15.
3. (1897) I. L. R. 22 Bom. 973.

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Gandharp Singh was a Kulin Brahmin of Kanouj. He owned considerable Zemindari and having no issue of his own wished to adopt to perpetuate his name. With the end in view, he took upon himself the education of the boy Jwala Parshad, Parbati's brother's son, and performed the Kanchedan (ear boring) ceremony. While on his death-bed he directed his wife Parbati, to adopt Jwala Parshad. Soon after his death in January 1899 Parbati applied for mutation of names. In April 1899 she adopted Jawala Parshad with the necessary rites and ceremonies. In June 1902 she performed the Upanayana (ceremony of investiture with the sacred thread) of Jawala Parshad and celebrated his marriage. In June 1907 the Plaintiffs-Appellants brought the present suit for a declaration of the invalidity of the adoption in the Court of the Subordinate Judge of Mainpuri who, in a very elaborate judgment, took the view opposed to that expressed in *Jai Singh* v. *Bijai Singh* [1], and basing his decision on his own interpretation of sub-sec. 16 of S. 5 and sub-sec 33 and 34 of S. 2, decreed their claim. On appeal the High Court holding that an adoption by a Hindu widow of her brother's son was valid, dismissed plaintiffs' suit. The Plaintiffs-Appellants then obtained leave to appeal to His Majesty in Council.

Lowndes for the appellants contended that the Subordinate Judge's conclusion on the evidence that no authority to adopt was given to the widow was right. He submitted that according to the Hindu Law an adoption by a widow of her brother's son was invalid. Dattaka Mimamsa Sec. 2, Sub-Ss. 33 and 34. S. 5 Sub-Sec. 16. West and Buhler's Hindu Law, 3rd Edition, p. 1032. Strange's Hindu Law, 4th Edn. p. 33. Sir F. Macnaughten's Consideration on Hindu Law, p. 170 and *Mussammat Battar Kuar* v. *Lutchman Singh* [2]. Dattaka Mimamsa is a work of high authority in the Benares School. It is usually followed in matters of adoption. *Radha Mohan* v. *Hardai Bibi* [3] and *Bhagwan Singh* v. *Bhagwan Singh* [4]. According to Hindu Law among Brahmins, a man could not adopt a child whose mother he could not have married. The adopted son must be "the reflection of a son". The test is whether the natural father of the child could have been appointed under the Niyoga to beget a child on the adoptive mother. In the case of a brother and sister this was

1. (1904) I. L. R. 27 A. 417.
2. (1875) 7 N. W. P. H. C. R. 6 117.
3. (1899) L. R. 26 I. A. 113, 135.
4. (1899) L.R. 26 I. A. 153 at 165.

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impossible. Under the Hindu Law the adoptive mother is not merely an agent of her husband. She is free to adopt or not. If she adopted certain legal results followed. The decision in *Jai Singh* v. *Bijai Pal Singh* [1] was opposed to the text of Dattaka Mimamsa the only authority in favor of the adoption. *Sriramulu* v. *Ramayya* [2].

[Their Lordships intimated to counsel for the Respondent that they wanted to hear them on the question of law.]

De Gruyther K.C. and B. Dube for the Respondents contended that the decision of the High Court was right. The adoption was made to the husband and the widow was merely an agent. Mayne's Hindu Law 7th Edn., pp. 142 and 144. The husband can adopt without consulting the wife. The husband authorised his wife to adopt this particular boy. The authority must be strictly pursued. The doctrine of *Niyoga* is now obsolete and ought not to be applied. There is no text to support the contention that the adoptive mother must be capable of marrying the natural father of the adopted son. S. 5 Dattaka Mimamsa dealt only with the mode of adoption. Sub-section 16, S. 33 of S. 2 prohibits the adoption of a sister's son. That term cannot include brother's son. Dattaka Mimamsa is no doubt a work of high authority on questions of adoption. It was not infallible. In some Courts Dattaka Mimamsa has not been followed. *Jai Singh* v. *Bijai Singh* [1], was relied on. Reference was made to *Sri Balusu* v. *Sri Balusu* [3] *Bhagwan Singh* v. *Bhagwan Singh* [4], *Debi Mangal Singh* v. *Mahadeo Prasad Singh* [5], *Srimati Uma Devi* v. *Gokulanand Mahatapatro* [6], *Collector of Madura* v. *Moothoo Ramalinga Sethupathi* [7], Dattaka Mimamsa S. 2 sub-sect. 19,21,—27-33 S. 5 sub-sec. 16. Dattaka Chandrika sub-sec. 8 Mayne's Hindu Law 7th Edn. pp. 480—482 Jolly's Hindu Law, pp. 161—164. Mandlik's Hindu Law, pp. 479—483.

Lowndes replied.

The Judgment of their Lordships was delivered by

Sir John Edge.—This is an appeal by the plaintiffs from a decree of the High Court of Judicature at Allahabad, dated the

1. (1904) I.L.R. 27 All. 417.
2. (1881) I. L. R. 3 M. 15.
3. (1899) I. L. R. 26 I. A. 113.
4. (1899) I. L. R. 26 I. A. 153.
5. (1912) L. R. 39 I. A. 121.
6. (1868) L. R. 5 I. A. 40.
7. (1868) L. R. 12 M. I. A. 397, 437.

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15th December 1909, which reversed a decree of the Subordinate Judge of Mainpuri, and dismissed the suit with costs.

The plaintiffs brought their suit in the Court of the Subordinate Judge of Mainpuri on the 15th June 1907 to have it declared that Jwala Parshad, who is a defendant and one of the respondents, was not the adopted son of one Tiwari Gandharp Singh, deceased, who had been the husband of Musammat Parbati Kunwar, who is the other defendant and respondent. The adoption which is impugned was made by Mussammat Parbati Kunwar in March 1899 to her deceased husband, Tiwari Gandharp Singh, who had died on the 9th November 1898 without issue surviving him, and had been a Brahman. Jwala Parshad was the son of a brother of Musammat Parbati Kunwar. The plaintiffs, who claimed as reversioners, denied that Jwala Parshad had been in fact adopted, and alleged that Tiwari Gandharp Singh had not given to Musammat Parbati Kunwar authority to adopt Jwala Parshad to him, and further alleged that Jwala Parshad, being a son of a brother of Musammat Parbati Kunwar, was in law ineligible for adoption by her as a son to her deceased husband.

The Subordinate Judge framed six issues ; two only of the issues are now of importance. It was concurrently found by the courts below that the adoption was in fact made. The two issues which have to be decided in this appeal are as framed by the Subordinate Judge :—

"(4) Did Gandharp Singh give permission to his wife to adopt "Jwala Parshad ?"

"(6) Is the adoption invalid, inasmuch as the boy is the son of the adoptive "mother's brother ?"

The authority to adopt Jwala Parshad was alleged to have been given to Musammat Parbati Kunwar by an oral will of her husband. Tiwari Gandharp Singh, a few days before his death. The Subordinate Judge held that the evidence that the authority to adopt Jwala Parshad had been given was untrustworthy, and found that no authority to adopt Jwala Parshad was proved to have been given.

The High Court on appeal saw no reason whatever for doubting the trustworthiness of the evidence of the witnesses who had deposed to the fact that Tiwari Gandharp Singh had given permission to his wife to adopt Jwala Pershad as a son to him, and after a careful consideration of the evidence and the surrounding circumstances found as a fact that the

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permission to adopt Jwala Parshad had been given. In their Lordships' opinion the learned judges of the High Court could have come to no other conclusion unless they had perversely disregarded the evidence and all the probabilities of the case. The direct evidence that the authority to adopt Jwala Parshad had been given by Tiwari Gandharp Singh to his wife was clear, and in their Lordships' opinion was unassailable, and other facts showed that it was probable that such an authority would be given. Tiwari Gandharp Singh was a man well advanced in years; he had been thrice married; he had no surviving issue; there was no *sagotra sapinda* in his family; he was the last male of the male line; he was a man of some considerable estate and position; and he had taken Jwala Parshad, when a child of 4 or 5 years of age, to live in his house with the object of adopting him as his son, should Jwala Parshad prove himself to be a boy worthy of adoption as his son. Their Lordships agree with the finding of the High Court that the authority to adopt Jwala Parshad had been given. That authority was not a general authority to Musammat Parbati Kunwar to adopt a son to Tiwari Gandharp Singh, it was a specific authority to her to adopt Jwala Parshad as the son to her husband.

There remains to be considered the question of law raised by the sixth issue which had been framed by the Subordinate Judge. The Court of the Sudordinate Judge of Mainpuri is a court which is subordinate to the High Court at Allahabad, and the Subordinate Judge of Mainpuri is bound to follow the decision in law of a bench of the High Court to which he is subordinate unless the decision of the bench has been overruled by a decision of a full bench of that court or unless it has been overruled expressly or impliedly on an appeal to His Majesty in Council, or unless the law has been altered by a subsequent Act of the legislature. As the Subordinate Judge was well aware, it had been decided five years before this suit was instituted by a bench of the High Court at Allahabad, composed of Sir John Stanley, the then Chief Justice, and Mr. Justice Banerji, in *Jai Singh Pal Singh and others* v. *Bijai Pal Singh and another* [1], that an adoption by a Hindu widow, in virtue of an authority to adopt given to her by her deceased husband, of her brother's grandson or son is not, according to Hindu law an invalid adoption, as the adoption by

1. (1904) I. L. R. 27 All. 417.

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the widow is not an adoption to herself but is an adoption to her deceased husband, and that the test of eligibility of the adopted son for adoption in such case must be the test which would have applied had the adoption been made by the husband himself in his lifetime.

The Subordinate Judge of Mainpuri, Chhajju Mal, professing disapproval of that decision of the High Court, which he was bound to follow, entered upon a consideration of Sanskrit texts bearing more or less upon the subject, and decided that as Musammat Parbati Kunwar could not have married her brother, the father of Jwala Parshad, the adoption of Jwala Parshad was invalid. It is difficult to follow the arguments of the Subordinate Judge, but he does not appear to have kept clearly before his mind that the question in this case was whether a Hindu widow, acting on her husband's authority, could validly adopt as a son to him the son of her brother, and was not the question as to whether a Hindu female could validly adopt to herself a son of her brother. On appeal, Sir John Stanley, C.J., and Banerji, J., applied the decision in *Jai Singh Pal Singh* v. *Bijai Pal Singh* [1], which had not been overruled, and accordingly decided that the adoption of Jwala Parshad was a valid adoption, and by their decree dismissed the suit with costs. From that decree of the High Court this appeal has been brought.

The foundation of the decision of the Subordinate Judge on this question of Hindu law is the Commentary of Nanda Pandita, which is known as the "Dattaka Mimamsa," The "Dattaka Mimamsa" is undoubtedly a high authority on the law of Hindu adoption and is treated with respect. The authority of the "Dattaka Mimamsa" was considered by this Board in *Radha Mohun* v. *Hardai Bibi* [2], and in *Bhagwan Singh* v. *Bhagwan Singh* [3], and the view of this Board was that the "Dattaka Mimamsa" is a work which has had a high place in the estimation of Hindu lawyers in all parts of India and has become embedded in Hindu law, but that caution is required in accepting the glosses of Nanda Pandita in the "Dattaka Mimamsa" where they deviate from or add to the Smritis. It was pointed out by Banerji, J., in *Jai Singh Pal Singh* v. *Bijai Pal Singh* [1], on this question as to whether a widow can lawfully adopt to her deceased husband

1. (1904) I L. R. 27 All. at p. 433. 2. (1899) L. R. 26 I. A. 113.
3. (1899) L. R. 26 I. A. 153.

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a son of her own brother, that Nanda Pandita in the "Dattaka Mimamsa" extended to adoption by females the rule of Hindu law that no one can be adopted as a son whose mother the adopter could not have legally married, an extension by Nanda Pandita which is not based upon the authority of any of the Smritis or institutes of Sages.

As Banerji, J., further pointed out in the same case the extension of the rule by Nanda Pandita is not supported by any text of the "Dattaka Chandrika," or by any of the texts of the Sages Saunaka and Sakala from which most of the rules of the "Dattaka Mimamsa" were deduced. It has not been shown to their Lordships that the extension by Nanda Pandita to which they are referring has been accepted as the law in India, at least, so far as adoptions by widows to their deceased husbands are concerned. It is true that in the case of *Musammat Battas Kuar* v. *Lachman Singh* [1] Pearson and Spankie, JJ., said :—

"No sufficient reason is shown why the doctrine of Nanda Pandita that a "woman may not affiliate a brother's son should not be accepted as correct, and "why it should not apply to the case of a woman adopting a son with the sanction "and on behalf of her husband. Indeed, it does not appear that the Hindu law "contemplates or provides for the adoption by a widow of a son in her own right."

It was not necessary for these learned judges to express any opinion on the subject, nor is it clear how the case came on appeal to the High Court, as the two courts below had concurrently found that it was not proved that the husband had given his wife authority to adopt a son.

It is quite clear that Tiwari Gandharp Singh could, in his lifetime, have legally adopted Jwala Parshad, the son of his wife's brother, and had he done so, the adoption would have been a valid adoption, and their Lordships fail to see any reason why Jwala Parshad, who was legally eligible for adoption by Gandharp Singh, should have become ineligible by reason of the death of Gandharp Singh. It must be remembered that the adoption was not by the widow in her own right and to herself; the adoption was to her deceased husband and under the authority which he had given to her. In *Sriramulu* v. *Ramayya* [2], the adoption of a son of a wife's brother was held to be a valid adoption, and it was rightly pointed out that the rule of Hindu law that a legal marriage must have been possible between the adopter and the mother of the adopted boy

1. (1875) 7 N. W. P. H. C. R. 117. 2. (1881) I.L.R. 3 M. 15

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refers to their relationship prior to marriage. In *Bai Nani* v. *Chunilal* [1], it was held that the adoption by a Hindu widow of her brother's son was valid. Their Lordships have not thought it necessary to discuss the texts and authorities which have been referred to, and are relevant to this question, as they have been fully and exhaustively considered by Sir John Stanley, C. J., and Banerji, J., in their judgments in *Jai Singh Pal Singh* v. *Bijai Pal Singh* [2].

This appeal fails, and their Lordships will humbly advise His Majesty that it should be dismissed. The appellants must pay the costs of the appeal.

Solicitors for Appellants: *T. L. Wilson & Co.*

Solicitors for Respondents: *Barrow, Rogers and Nevill.*

PRIVY COUNCIL.

[On appeal from the High Court at Calcutta.]

Present:—Lords Dunedin and Sumner, Sir John Edge and Mr. Ameer Ali.

Ahmed Musa Saleji and others ... *Appellants.**

v.

Hashim Ebrahim Saleji and others ... *Appellants.*

Ahmed Musa Saleji v. Hashim Ebrahim Saleji.

Partnership—Suit for accounts—Dissolution—Interest—Preliminary decree—Part ordering inquiry if to be separated and treated as order—If may be questioned on appeal from final decree—Order—Civil Procedure Code (Act V) of 1908—Ss. 97 and 2 (2)—Defective. Partner trading with partnership fund on his own account—Liability to account with interest.

In a suit for accounts o a dissolved partnership, various matters including the membership of the firm were in dispute. The trial Judge holding that the partnership was dissolved from a certain date prior to suit referred it to the referee to ascertain as to who were the partners entitled to a share in the assets and good-will of the partnership in question and to take an account of the dealings of the parties with the assets of the partnership. This formal adjudication was not appealed against. In the appeal from the final decree, it was for the first time contended that the trial Judge ought to have tried the matter himself and not referred it to the referee, that the reference was an order and not a decree, and as such S. 97 was not a bar to the matter being urged in appeal.

Held, that the first order of the trial Judge was a "decree" and ought to have been appealed against, and could not be questioned in appeal from the final decree.

The Code makes no provision for something which is neither a decree nor an order, nor for anything which is both; neither does it provide that one adjudication by the court can be resolved into diverse elements some of which are decrees, some orders. What is in substance a decree does not cease to be such because a subordinate part of it, if correctly made, might have been made separately as an order.

Held, further, that it was settled law that when after dissolution but before settlement of partnership accounts, one partner carries on business with partnership

* 19th January 1915.

1. (1894) I. L. R. 22 B. 973. 2. (1904) I. L. R. 27 A. 433.

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assets the other partners have a right to claim the assets with profit or with interest, and this apart from fraud or misconduct in the nature of fraud.

Kadir Hossein v. *Emdad Hossein* [1] referred.

Appeal from a judgment and decree of High Court at Calcutta in its appellate jurisdiction, dated September 1, 1913, on an appeal from a judgment and decree of the High Court in its Original jurisdiction dated April 22, 1912.

The appellants Ahmad Mussaji Saleji and Ismail had been partners with Musaji and Ebrahim Suleman Saleji and the respondent Mamooji Musaji in the firm of Ebrahim Suleman & Co. of many years standing. The firm was dissolved by mutual arrangement amongst the partners on and from July 1, 1907. After the dissolution, Ahmed Musaji Saleji together with the appellants started a new firm doing the same business under the name of Musaji Ahmed & Co. On June 30, 1908, Hashim Ebrahim Saleji as one of the sons and executors of Ebrahim Soleman Saleji instituted the suit for an account of the dealings that and assets of the firm of Ebrahim Suleman & Co. On August 30, 1909 a preliminary decree was passed in the suit declaring that the partnership was dissolved on the 1st of July 1907. A reference was made to the Assistant Referee of the court to find out among other things who were the partners entitled to share in the partnership assets and to take an account of the dealings of the parties with the assets of the partnership business. On July 3, 1911, the Assistant Referee made his report to which the appellants took exception, but the trial Judge dismissed the objections in their entirety. A decree was then made in the terms of the report made by the referee and the appellants were ordered to bring into court a sum of over seven lakhs with interest from 1st July 1907. The appellants then appealed to the High Court (Appellate Side) against the order and decree of the trial Judge. The High Court slightly varied the decree of the lower Court. The appellants then appealed to His Majesty in Council in due course.

Sir Robert Finlay, K.C., M.P. Dunne & B.N. Bose for the appellants. The trial Judge was wrong in referring the matter to the referee, as under O. XX, r. 15 of the Civil Procedure Code, only the taking of accounts was to be referred to the referee and not the determination of the point as to who were parties. The High Court decided that the appellants were not entitled to question the order of Aug. 30 in their final appeal. The adjudication of

1. (1901) I. L. R. 29 C. 758.

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August 30, 1909 was not a preliminary decree within the meaning of S. 97 of C. P. C. of 1908. It clearly falls within the terms of S. 2 (2). The trial Judge had no jurisdiction to refer to the Assistant Referee the enquiry as to who were the partners entitled to share in the assets. It was the province of the court to decide the question. The order of reference was an order without in any sense being an adjudication contemplated by the section. It was an appealable order. Reference was made to Ss. 96, 104 and 121 and 122 of the Code. The courts were wrong in allowing interest which was not claimed. There was no finding of fraud and in the absence of it, no interest should have been allowed. Reference was also made to *Khader Hossein* v. *Emdad Hossein* [1], *Johnson* v. *Rex* [2]. Bullen and Leake, 2nd Edn., p. 51, 52, 3 and 4 Will IV ch. 42 Ss. 28, 29 *Burland* v. *Earle* [3] *and London Chattam and Doner Ry. Co.* v. *S. E. Ry. Co.* [4].

Upjohn, K.C., (with him *Cozens-Hardy, K.C., and Lowndes,*) for the respondents. The question whether the amount ordered to be brought into Court is excessive was raised in the Court below and should not be entertained. The appellants are liable to pay interest ; whether it was raised in the pleadings or not is immaterial. It is purely a matter of discretion. It is a well-settled rule of law that if a continuing partner after dissolution but before taking accounts gets partnership assets into his hands or trades with them, the other partners can elect to claim the share of profits or interest on the amount from dissolution. Lindley on Partnership, 7th Edn., Bk. 4, ch. 2, Sec. 2, p. 627. *Clements* v. *Hall* [5], *Yates* v. *Finn* [6], and *Burland* v. *Earle* [3].

Sir Robert Finlay replied.

The judgment of their Lordships was delivered by

Lord Sumner.—This was an action to have partnership accounts taken, and for that purpose to have various matters decided by the Court. Three questions only were raised before their Lordships on the present appeal.

The circumstances raising the first question were as follows: The membership of the firm was in dispute. Certain persons were alleged, on one side, to have been partners, and, on the other, to have been only employees remunerated by a share of annual profits. The suit was begun on 30th June 1908, and on 30th

1. (1901) I.L.R. 29 C. 758.
2. (1905) A. C. 590.
3. (1902) A. C. 817 (P.C.)
4. (1893) A. C. 429.
5. (1858) 2 De. G. and J. 173.
6. (1880) 13 Ch. D. 839.

August 1909 the trial Judge, Fletcher J., by his formal adjudication (to use a neutral term) " declared" that the partnership in question was dissolved as from 1st July 1907, and then " ordered and decreed" that—

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" It is referred to the assistant referee of this Court to take the following account and to make the following enquiries, that is to say :—

1. To enquire who were the partners who were entitled to share in the assets and good will of the said partnership business ;

2. To take an account of the dealings of the parties with the assets of the said partnership business ; "

and, further, certain other matters not now material.

This adjudication was immediately appealable but was not appealed. The assistant referee duly held the enquiries directed, and all matters were gone into at a great expenditure of time and money. His report on enquiry No. 1 was adverse to the appellants, and being excepted to by them was confirmed by Fletcher J.

The appellants then, by memorandum of appeal, dated 23rd May 1912, raised the question whether enquiry No. 1 was rightly included in the adjudication dated 30th August 1909, or whether it was not one which should have been made by the learned Judge himself. This at once and for the first time raised the question, which is the first and chief issue in the present appeal, whether the above mentioned determination of Fletcher, J. was a "decree" or an " order" within the meaning of those terms in the Civil Procedure Code, Act V of 1908. If it was a decree it was a preliminary decree within Section 97, and any appeal was incompetent and barred thereby; if it was an order it was apealable still. Their Lordships would unfeignedly deplore a state of procedure which enabled the appellants to take their chance of success before the assistant referee at such a cost in time and money and then, after they had lost the day, to contend that the matter never should have gone before him at all ; yet it must be so if such be the meaning of the Code.

The High Court, while thinking that the enquiry in dispute should not have been directed, decided at the same time that the adjudication of Fletcher, J., which included this direction, was itself a decree and therefore being a preliminary decree could not under Section 97 of the Code be questioned on the final appeal. Their Lordships are in accord with the learned Judges of the High Court.

The adjudication itself began by declaring that the partnership was dissolved as from a certain date, and thus *in limine* settled

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rights between the parties. This declaration was the foundation for all subsequent accounts and proceedings, which were merely incidental thereto and consequential thereon. It matters not whether the instrument of partnership fixed the dissolution at a date which had passed before the suit began, or whether the parties had agreed to a dissolution or agreed in submitting to a dissolution by the Court, or whether the Court decreed a dissolution for cause shown before it after a *litis contestatio*. The declaration when so made was what the Court's adjudication, and indeed the appellants' own case, call it, a decree. The Code makes no provision for something which is neither a decree nor an order, nor for anything which is both, neither does it provide that one adjudication by the Court can be resolved into divers elements, some of which are decrees and some orders. This was in substance a decree: it did not cease to be such, because a subordinate part of it, if correctly made, might have been made separately as an order. It conclusively determined the rights of the parties in regard to certain, and those essential, matters, involved in the suit, and the expression "matters in controversy" in Section 2 (2), the (definition of "decree") cannot, in their Lordships' opinion, be pressed so as to exclude matters which, though as it happened they were common ground, must have been actually decided, if any question had arisen and were the foundation of the whole determination. The Code has got rid of such doubts as were debated in *Khadem Hossein* v. *Emdad Hossein* [1]. Accordingly S. 97 of the Code applies: the appellants took their objection too late and the High Court rightly decided against them.

The residue of the case may be shortly disposed of. The appellants were ordered to bring certain money into Court and to pay interest as from a certain date. The contention on the former point, namely, that the amount was excessive, was not raised below at all and but faintly before their Lordships. In any case the amount ordered to be brought into Court was a matter of discretion and that discretion does not appear to have been exercised on any wrong principle. No more need be said as to this. The other point is equally short. It is well settled that in certain cases, when on the dissolution of a firm one of the partners retains assets of the firm in his hands without any settlement of accounts and applies them in continuing the business for his own benefit,

1. (1901) I. L. R. 28 C. 758.

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he may be ordered to account for these assets with interest thereon; and this apart from fraud or misconduct in the nature of fraud. The report of the assistant referee disclosed conduct of this sort on the appellants' part falling within the decided cases, even if it did not amount to fraud, as probably the referee meant to find that it did. Both Courts below adopted this report and therefore there are concurrent findings of fact against the appellants and no question of law is raised at all.

Their Lordships will humbly advise His Majesty that this appeal be dismissed with costs.

Solicitors for appellant: *Burton, Yeates and Hart.*

Solicitors for respondents : *Watkins and Hunter.*

PRIVY COUNCIL.

[On Appeal from the High Court at Allahabad.]

Present.—Lord Dunedin Sir George Farwell, Sir John Edge and Mr. Ameer Ali.

Mahant Lahar Puri ... ... *Appellant.**

v.

Mahant Puran Nath ... ... *Respondent.*

Mahant Lahar Puri v. Mahant Puran Nath.

Religious Endowment—Math—Mahant—Succession—Election by dasnam bhik—Burden of proof—Defendant in possession.

When the founder has not prescribed any rules or practice to be followed in the selection and appointment of future mahants, the selection and appointment of a person to be a *mahant* on a vacancy occurring in the mahantship must depend on the custom or usage and the practice which have prevailed in the appointment of mahants in the past.

Where two persons one as *sadhak* or disciple and the other as gurubhai or co-disciple of the deceased mahant claimed to have been elected by *dasnam-bhik* or ten classes of mendicants as mahant of a temple in Hardwar,

Held, that the defendant being in possession of the temple and the property appertaining to it, it was for the plaintiff to prove his right to the mahantship.

An election by the *dasnam-bhik* to be a valid and effectual election must be by a majority of the *dasnam-bhik* assembled for that purpose and not a separate election by a faction of the *dasnam-bhik.*

Appeal from a judgment and decree of the High Court at Allahabad dated March 11, 1912 reversing a judgment and decree of the Subordinate Judge of Saharanpur dated November 29, 1909.

The math called Akhara of Baba Sarwan Nath was established by Sarwan Nath some sixty years ago. Of the two orders of Goshains, Girhast and Nihang *i.e.,* those who practised celebacy, this belonged to the Nihang set. The founder had laid down no rule

* 15th March, 1915.

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of succession. The principal temple was situated at Hardwar, but there were two subordinate temples at Thaneswar and Pihwa. According to the custom of the math the election always took place in the temple at Hardwar by *dasnam-bhik i. e.,* ten classes of fakirs *viz.,* Gir, Sagar, Sarsuti, Aran, Ashoram, Parhat, Ban, Tirath, Bharti and Puri. On the thirteenth day of the death of the mahant succession used to take place. The appellant alleged that he was the only disciple of the last mahant and as such the only person qualified to be elected mahant and that he was duly elected by the ten classes of mendicants mentioned above. He also alleged that the Respondent took possession of the math during his temporary absence, got a *mahantinama* drawn up in his favour witnessed by those who were present. The Respondent denied all the allegations and pleaded that it was not necessary that the disciple of the last mahant should be elected, that he was a disciple of the mahant who preceded the last mahant and as such qualified for election and that he was duly elected. The Subordinate Judge decreed plaintiff's suit. On appeal to the High Court this judgment of the Subordinate Judge was reversed. The appellants then appealed to His Majesty in Council in due course.

Sir Erle Richards, K. C. (with Parikh and Nadkarni) for the appellant. The custom of the math governs the succession in a case like the present. *Gandapuri* v. *Chhatar* [1]. Only the disciples of the last mahant are entitled to be elected. Only in the absence of any disciple, other persons become eligible for election. This custom has been established and is in accordance with the general law. *Gossain Dowlat Gir* v. *Bisseswar* [2], *Ramji Dass* v. *Lachhu Das* [3]. It has been established by evidence that the practice has been to elect a disciple of the last mahant and that the appellant is the disciple of the last mahant. The finding of the courts is that he was elected.

DeGruyther, K.C., and Dube for the respondent, contended that the respondent was elected by the majority of the *dasnam bhiks* while the appellant only by a small discontented minority. The founder had laid down no rules of succession. It is not proved that a disciple of the last mahant succeeds. Both parties contend that there must be election. The evidence establishes that

1. (1886) L. R. 13 I. A. 100. 2. (1873) 19 W. R. 215.
3. (1902) 7 C.W.N. 145.

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a small number of discontented people appear to have elected the appellant. The election must be by a majority made in good faith *Ramalinga* v. *Vythilinga* [1]. The election of the appellant is not valid. No custom existed as to the rule of succession. The founder had laid down none, and therefore the appellant to succeed must prove that he alone was entitled to succeed.

Reference was made to *Genda Puri* v. *Chatar Puri* [2], *Gossamee Shri Gridharee* v. *Rumowloljee Gossamee* [3], *Ramji Dass* v. *Lachan Das* [4],

Sir E. Richards replied.

The Judgment of their Lordships was delivered by

Sir John Edge.—This is an appeal from a decree of the High Court of Judicature at Allahabad, dated the 11th March 1912, which reversed a decree of the Subordinate Judge of Saharanpur, dated the 29th November 1909, and dismissed the suit with costs. The suit was brought on the 12th January 1909, by Lahar Puri, who is the appellant, against Puran Puri, who is the respondent. The dispute between the parties to this appeal relates to the title to the mahantship of a Hindu math or temple, at Hardwar, known as the Akhara Baba Sarwan Nath, and to the property appertaining to the math.

The math was founded by one Baba Sarwan Nath, who was a Sunniyasi Rukhar Fakir and died in 1849. Since his death, there have been several mahants of the math in succession. It does not appear that Baba Sarwan Nath, in founding the math, prescribed any rules or practice to be followed in the selection and appointment of the future mahants. Consequently, the selection and appointment of a person to be the mahant of the math on a vacancy occurring in the mahantship must depend on the custom or usage and the practices which have prevailed in the appointment of mahants of this math, and on that principle this suit has been fought in the First Court, in the High Court, and before this Board.

The dispute as to the title to the manhantship arose in February 1905, on the death in that month of Jhandu Nath, who was the mahant of the math, and had succeeded Tej Nath in the mahantship in 1897. In this suit the plaintiff alleges that he

1. (1883) L. R. 20 I A. 150.
2. (1886) L. R. 13 I. A 100.
3. (1889) L. R. 16 I. A. 137,
4. (1902) 7 C. W. N. 145.

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was the only *sadhak* (disciple) of the deceased Mahant Jhandu Nath, and being the only *sadhak* of Mahant Jhandu Nath, he was the only one of the mendicant fraternity of the temple who was qualified for election to the mahantship; that he was duly elected mahant by the ten classes of mendicants *(dasnam bhik)* on the 24th February 1905; and that he was appointed with the usual ceremonies. On the other side the defendant denies that the plaintiff had ever been the *sadhak* of Mahant Jhandu Nath, or was qualified for election to the mahantship, or was elected mahant. The defendant's case is that it is not necessary that the *sadhak* of the last mahant should be elected as the mahant. He alleges in his written statement that:—

"The *sadhak* or a co-disciple, or the *sadhak* of a co-disciple of the deceased "mahant is appointed a mahant, and failing these or in the event of none of these "being a fit person, the mendicants of all the ten classes (*dasnam bhik*) have the "power to make any fit person the *sadhak* of the *gaddi* and appoint him a ma-"hant."

The defendant further alleges that he was a *sadhak* of Mahant Tej Nath, who preceded Mahant Jhandu Nath on the *gaddi* of the temple, and as such *sadhak* was qualified for election to the mahantship, and that he was duly elected and with the usual ceremonies was appointed mahant by all the ten classes of mendicants (*dasnam bhik*) on the 24th February 1905. It is not disputed that the defendant was a *sadhak* of Mahant Tej Nath. It is common ground that the time for the election of a successor in the mahantship of this temple is the *terhwin*, the thirteenth day ceremony, after the death of the deceased mahant, which in this case fell on the 24th February 1905. It is also common ground that on the death of a mahant of this temple the election of his successor takes place at Hardwar, and that the election and appointment of the new mahant is by the ten classes of mendicants (*dasnam bhik*) assembled at Hardwar for that purpose. From the evidence their Lordships infer that the usual place at which the *dasnam bhik* assemble for the purpose of electing a mahant of this temple, and at which they elect a mahant is at the temple. Another common ground is that on the election and appointment of a mahant of this temple, a mahantinama is drawn up and is witnessed by those who were present at the election, and is registered.

The defendant who was the general attorney and storekeeper of the deceased mahant, is in possession of the temple and of the

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property appertaining to it. Consequently, it is for the plaintiff to prove his right to the mahantship, which, if proved, would in the case of this temple carry with it the right to the possession of the temple and of the property appertaining thereto. If the plaintiff has failed to prove that he is the duly elected mahant of the math, his suit must fail, and in that event it would be immaterial to consider whether the defendant is, or is not the mahant of the math, or whether he has or has not any better title to the temple and the property which appertains to it than a title of mere possession.

* * *

[The judgment here proceeds to discuss the evidence.]

* * *

The High Court has found that the majority of the persons present on the morning of the 24th February, who were qualified to elect a mahant of this temple were in favour of the defendant; that in point of numbers and of influence the defendant received more support than the plaintiff did; that the election of the defendant must have taken place before that of the plaintiff; and that there was no attempt on the part of the defendant to conceal the arrangements which he had made for the 24th February 1905. It has not been shown to their Lordships that the High Court came to a wrong conclusion on any one of these points. An election by by *dásnam bhik* of a mahant to be a valid and effectual election must be by a majority of the *dasnam bhik* assembled for that purpose. A separate election by a faction of the *dasnam bhik* is not a valid and effectual election. Their Lordships have come to the conclusion that the plaintiff has failed to prove that he was elected a mahant.

Their Lordships will humbly advise His Majesty that this Appeal should be dismissed. The appellant must pay the costs of this Appeal.

Solicitors for appellant: *E. Dalgado.*

Solicitors for respondent: *Barrow, Rogers & Nevill.*

PRIVY COUNCIL.

[On Appeal from the High Court at Calcutta.]

Present:—Lord Shaw, Sir George Farwell, Sir John Edge and Mr. Ameer Ali.

Raja Ramkanai Singh Deb Darpashaha and another ... *Appellants.* *

v.

Mathewson and others ... *Respondents.*

P. C.
Raja Ramkanai Singh
v.
Mathewson.

Chota Nagpur Encumbered Estates Act — Putni lease—Sanction by the Commissioner, to the transaction as distinguished from deeds prepared—Persona *of the lessee—Misdescription as to—Not material when no mistake as to identity —Nonpayment of premium within due date—Acceptance of, after—Delay—Maintenance —Grants—Reversion in—Not included in the Putni.*

Where a proposed lease had the sanction of the Commissioner as required by the Chota Nagpur Encumbered Estates Act and the rules framed thereunder, but it was objected that the sanction was insufficient, as the lease-deed as finally drawn up had not been approved by the Commissioner.

Held, that the transaction itself in all its essential details having had the sanction of the Commissioner, the objection had no force.

In administrative and departmental action it must necessarily be the case that formal details may have to be entered upon in order to carry into practical effect and put into legal shape, the arrangement to which sanction is adhibited and a challenge merely on the ground that the document ultimately prepared in the carrying out of the transaction duly sanctioned had not been submitted for sanction cannot be sustained.

Held, also further that the description of the lessees as Watson & Co., whereas in fact, they were a limited Company, did not vitiate the sanction, as it was clear that the person intended was the Company.

Held, that the objection that the sanction required the premium to be paid before the end of March 1890, and it was not actually paid till 25th June, was also unsustainable, as the delay was not great, and the official manager, *viz.*, the Deputy Commissioner, had accepted the amount without objection, especially after the considerable lapse of years that had taken place.

A putni lease of the land, by itself will not include reversionary rights in maintenance grants secured over the land.

Appeal from a judgment and decree of the High Court, at Calcutta dated April 23, 1910, affirming a judgment and decree of the Subordinate Judge of Manbhum, dated Nov. 25, 1907.

The Raja of Barabhum on November 12, 1881, granted a mokhurari or permanent lease to one Kenny, of all minerals in his estate on certain terms. On Feb. 27, 1883, he borrowed Rs. 60,000 at 10 per cent. from Robert Watson and Co., who were

* 19th February 1915.

zamindars and money-lenders, and granted them ijara of his estate for twenty-one years with the option that they could take putni lease of a certain portion of the ijara lands. All lands for the Khorposh (lit. eating and clothing) or maintenance of the members of the Raja's family were excepted from the ijara, but Kenny's mining lease was to go to them in certain contingencies on the same conditions as Kenny had accepted 19 C.W.N. 585. On March 8, 1885, putni of ghatwali lands was granted to the Company. On August 26, 1887, the raja borrowed a further sum of Rs. 40,000 from the said firm on mortgage and Rs. 5,000 on a promissory note. He then handed over the estate to the Local Government for management and one Mr. Baker, Deputy Commissioner, was appointed the manager. The Company approached the raja with various schemes to get the estate out of the Government hands in view of taking possession of the estate permanently, but without result. The Deputy Commissioner who knew that the estate would become free from all encumbrances in about thirteen years, without any reference to the raja, entered into negotiations with the Company for the ijara to be converted into a putni lease. Various proposals were made at different times and sanction of the Commissioner obtained. The sum of Rs. 30,000 as bonus was to be paid at a certain time, but in fact, was not then paid. The putni lease was never placed before the Commissioner. The raja knew nothing about it. Before the completion of the putni lease however the raja came to know of it, protested against the action of Deputy Commissioner, appealed without success to the Commissioner and the Board of Revenue. On the expiration of the ijara, the raja having died his successor, the appellants, brought a suit for a declaration that the grant of putni by the manager was void. The Subordinate Judge however decided against the appellants moving on the ground of limitation and acquiescence. On appeal to the High Court, the appeal was dismissed on the ground that the manager had acted within his powers and that putni was duly granted. Appellants then obtained leave to appeal to His Majesty in Council in due course.

Upjohn, K.C., and *Dunne*, for the appellants, contended that the Company had at the very best acquired the same right in perpetuity as they had as ijaradar. The minerals and trees, etc., did not pass to them. Putni did not necessarily include rights apart from the use and enjoyment of the surface.

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The putni is in excess of the rights granted under the *ijara* and is *ultra vires*. The Deputy Commissioner had acted without the sanction of the Commissioner. The Law required the sanction of the Commissioner. *Gulab Singh* v. *Seth Gokuldas* [1], distinguished. Reference was also made to Wards Manual pages 200 and 202. The lease was sanctioned in favour of individuals and not in favour of a Company and the change in the nature of the lease was a change in the essentials. The Khorposhdars were not taken into account in estimating the rent.

DeGruyther, *K. C.*, and *Sir W. Garth*, for the respondent contended that the suit was untenable under the provisions of Act VI of 1876. The general validity of the putni being established, it operated to convey all rights in minerals and timbers. The evidence showed that the essential terms were considered by the Commissioner. The putnidars have no right of interference with the existing Khorposh which would revert to the grantors on their expiration. The rights of third parties have not been affected. The case in L. R. 40 I. A. 117, was not distinguishable in principle and should determine the point in question.

Upjohn replied

The Judgment of their Lordships was delivered by

Lord Shaw.—This is an appeal from a judgment and decree of the High Court of Bengal, dated the 28th April, 1910, affirming a judgment and decree of the Subordinate Judge of Manbhum, dated the 25th November 1907, dismissing the suit with costs. The main object of the suit was to obtain a declaration of the nullity of a putni lease dated the 29th June 1890. The other demands in the plaint were consequential upon such a declaration of nullity being obtained. The only question argued in the appeal was whether the putni lease was *ultra vires* and invalid.

The facts are briefly these: The first appellant, the plaintiff, is the son and successor of the late Raja Broja Kishore Singh Deb Darpashaha, the owner of the Barabhum estate. In 1883 the Raja borrowed Rs. 60,000 from Messrs. Robert Watson and Company, on a mortgage of his estate, and on 27th February of that year, he executed an ijara lease in their favour. This lease contained a condition that if the Company should desire to take a putni lease of such portions of 84¼ villages as were treated in the ijara as ghatwali lands, the Raja would grant such a putni on

1. (1913) L. R. 40 I. A. 117.

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certain terms. On 8th March 1885, this putni was granted. Four years thereafter, viz., on 6th March 1889, the affairs of the Raja being deeply embarrassed, his estate was placed under the protection of Government by virtue of the Chota Nagpur Encumbered Estates Act, 1876.

There were apparently considerable difficulties in arranging for the liquidation of the debts. After negotiations, it was agreed that the remaining portions excluded from Messrs. Watson and Company's former putni lease should be demised to these creditors for a sum of Rs. 30,000. Their Lordships have considered the documents and have no hesitation whatsoever in accepting the view that the true, and, in fact, only meaning of the transaction was that expressed in the Commissioner of Chota Nagpur's letter of the 20th February 1890, in which he sanctioned "the proposal to grant them a putni lease of the 84¾ "villages excluded from the present putni."

The elements of the transaction being thus settled and the amount of the premium arranged, what remained to be done was to have the actual deed drawn up and executed. This was done. It has been argued before the Board that the putni lease which was sanctioned was to be a lease containing the terms of the ijara lease. The Board cannot assent. These two contracts are essentially different in character, the latter being of a temporary character, containing provisions and reservations suitable to a lease for a short duration. Their Lordships have no hesitation in accepting the judgment of the High Court which is thus expressed on this point:—

"The fact that the Raja had granted a previous putni lease was known to the "Commissioner, and was, in fact, referred to in his sanction. * * * It is "* * * reasonable to assume that the Commissioner understood its character "when he was asked to sanction a similar putni. It would have been inconvenient "that the subsequent putni should be on any different terms from the first, because, "as pointed out in the course of the correspondence, the proposed new putni was "in respect of villages which were scattered about in the area covered by the "earlier putni, and the object of the second putni was to round up the estate. I "do not think, therefore, that this ground has been made out."

Apart from the point just dealt with, the putni lease actually granted is now challenged. The grounds of challenge may be compendiously and conveniently stated as follows:—

(1) It is said that the sanction was, upon a sound construction of the letter of 20th February 1890, merely a sanction of a proposal to grant a putni. Their Lordships think the objection

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to be trivial. This proposal had been made, it had been accepted, a contract was accordingly completed on the subject, and it was that contract so completed that was sanctioned.

(2) It was said that the sanction contained the clause "provided that the amount be paid before the end of March, 1890." In the course of carrying out the bargain some delay, not very great, occurred. There was an exchange of views as to the actual wording of the draft putni, but the document was finally settled by both parties, and on the 25th June 1890, Messrs. Watson and Company paid the salami of Rs. 30,000 to the official manager of the estate, viz., the Deputy Commissioner. This being done, it does not appear to their Lordships that it would have been open thereafter for a challenge to be made, even by the Deputy Commissioner himself, or for the Commissioner's sanction to have been withdrawn. *A fortiori* there appears no ground for sustaining such a challenge when put forward after a considerable lapse of years on behalf of the successor of the debtor.

(3) The last objection is of a twofold character. It is urged that the sanction of the Commissioner, being a statutory requisite in virtue of the Chota Nagpur Encumbered Estates Act of 1876, of the rules thereunder, and of the Act of the Governor-General, No. V of 1884, such sanction was not given to the final and actual putni lease itself. This depends upon a construction, especially, of rule 16, which is in the following terms :—

"The power to lease under section 17 of the Act shall be subject to the following provision :—No lease shall be given for any term exceeding three years without the sanction of the Deputy Commissioner, or exceeding four years without the sanction of the Commissioner."

Upon this point, their Lordships are of opinion that when it is affirmatively established that a transaction itself in all its essential particulars has obtained the sanction of the Commissioner, and when it is requisite that the transaction be carried into effect by the preparation of the appropriate deeds, a challenge merely on the ground that the document ultimately prepared had not been submitted for sanction cannot be sustained. In administrative and departmental action, it must necessarily be the case that formal details may have to be entered upon in order to carry into practical effect, and put into legal shape, the arrangement to which sanction was adhibited. The first head of this objection accordingly fails. And it was further urged that in any view the transaction

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which was sanctioned was a transaction of a grant of a putni lease to Robert Watson and Company, in other words to a firm of individual men and not to Robert Watson and Company, Limited, *i.e.*, a different and incorporated *persona.* This demands careful consideration. There is this to be said for the objection, that the *persona* in the latter case is different from the *persona* in the former, and that a change in the lessee or putnidar ought to be treated as a change in essentials. It may be added that a putni lease of land, an agreement of an important and wide-reaching character might demand separate consideration, and point to a different conclusion when this essential was altered. Questions might arise, and difficulties suggest themselves with regard to a limited Company against whom legal remedies at law might not be the same as in the case of individuals, and public and administrative considerations might come into play operative either in the way of restriction or refusal on account of a change in *persona* in the lessee. In the opinion of their Lordships, it is not necessary to pronounce any judgment upon this point in the present case. For their Lordships are of opinion that when the negotiators in the course of correspondence mentioned in their letters Robert Watson and Company, they did, in fact, mean and were perfectly understood to mean Robert Watson and Company, Limited, the fact of the incorporation of the limited concern being well-known; and, indeed, one of the principal documents of the case is the petition dated 14th May 1889, being the petition of Messrs. Robert Watson and Company, Limited, filing the account of the money due to them. It may be true that the limited concern is a different one from the previous and unincorporated firm, but in the language of the judgment of the High Court:—

"The misdescription does not, under the ordinary principles applicable to such "matters, affect the validity of the sanction or the lease. Though there was such "a misdescription, it is perfectly clear what was intended by the sanction, and "that it was intended that the lease should be given and taken by the persons who "are properly described as Messrs. Robert Watson & Co., Limited."

A point was taken to the effect that the putni transaction could not be held to have been ratified, seeing that it had not specifically taken into account the existence of khoorpoosh, or maintenance rights, over the property sold. These could in no view have been affected for the simple reason that the interests of third parties properly secured over the properties, were in no respect prejudiced, And as to the further point that in the event

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of the discontinuance of these rights a certain reversion would follow to the zemindar, their Lordships are of opinion that this reversionary right not being in fact embraced within the grant, no prejudice to any such right has occurred. The point accordingly fails.

Their Lordships are of opinion that the judgments of the Courts below are correct, and they will humbly advise His Majesty that the appeal be dismissed with costs.

Solicitors for appellants: *Theodore Bell and Co.*

Solicitors for respondents: *Burton Yeates and Hart.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Sir John Wallis, Chief Justice and Mr. Justice Seshagiri Aiyar.

Chandu *alias* Shinivasa Pai ... *Appellant* (Plaintiff.)*

v.

Koaja Povjari and others ... *Respondents (Defts.)*

Chandu *alias* Shinivasa Pai v. Koaja Povjari.

Mortgage—Redemption—Mortgage for a term—Provision for payment of mortgage money within a specified period—Redemption before expiry of the term allowable.

Where a usufructuary mortgage deed provided for the repayment of a portion of the mortgage debt at the end of March 1910 and for the repayment of the balance "within the end of March 1952".

Held that the mortgage was redeemable at any time before the end of March 1952.

A provision for payment by the mortgagor on or before a certain date is sufficient indication of an intention to allow him to redeem before that date.

Rose Ammal v. *Rajaratnam Ammal* [1] *Chinnaswami* v. *Krishna Reddi* [2] followed.

Baktawar Begum v. *Huseini Kanum* [3] and *Bir Mohamed Rowther* v. *Nagoor Ravuther* [4] distinguished.

Appeal from the decree of the Court of the Subordinate Judge of S. Canara in C. S. No. 47 of 1912.

B. Sitarama Row for Appellants.

K. Y. Adiga for Respondents.

The Court delivered the following

Judgment:—In the present case the mortgage provides for the repayment of part of the mortgage debt at the end of March 1910 and for the repayment of the rest "within the end of March 1952" which we think must mean on or before the 31st March 1952. There has been some difference of opinion as to whether

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* A. S. 160 of 1913. 25th March, 1915.

1. (1898) I. L. R. 23 M. 33.
2. (1906) 16 M. L. J. 146.
3. (1914) I. L. R. 36 A. 195. s. c. 26 M.L.J. 474.
4. (1914) 27 M. L. J. 483.

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under a provision of this kind a mortgagor is entitled to redeem before the end of the period. It was held in *Vadju* v. *Vadju* [1] and in *Husaini Khanam* v. *Husain Khan* [2] that he was not. On the other hand it was held that he was, in *Rose Ammal* v. *Rajarathnam Ammal* [3] and in *Chinnasami Reddiar* v. *Krishna Reddy* [4] and in *Purnachandra Sarma* v. *Peary Mohan Pal Das* [5]. The recent decision of the Privy Council in *Bakhtawar Begum* v. *Husaini Khanum* [6], on appeal from *Hussaini Khanam* v. *Hussain Khan* [2] lays down that ordinarily and in the absence of a special stipulation the mortgagor is not entitled to redeem before the close of the period for which the mortgage was executed. Their Lordships observed that the language used in that case "in nine years" was certainly ambiguous, and that much might be said in favour of the conclusion of the Allahabad High Court. It was however unnecessary to decide the point. Notwithstanding these observations, we think we are at liberty to hold following *Rose Ammal* v. *Rajaratnam Ammal* [3] and *Chinnasami Reddiar* v. *Krishna Reddy* [4] that a provision providing for payment by the mortgagor on or before a certain date is a sufficient indication of an intention to allow him to redeem before that date, especially where as here a stipulation is made applicable only to the balance of the mortgage debt. In *Bir Mohamed Rowther* v. *Nagoor Rowther* [7], there appears to have been a fixed period for payment. We must accordingly reverse the decree and remand the case for disposal according to law. The costs will abide the result. The memorandum of objections is dismissed.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Ayling and Mr. Justice Seshagiri Iyer.

Sathyabhama ... *Appellant* (Plaintiff).*

v.

Kesavacharya ... *Respondent (Defendant).*

Hindu Law—Widow—Right to maintenance—Unchastity—Reformation at time of suit—Maintenance secured by instrument—Effect of.

*S. A. No. 2506 of 1913. 1st April 1915.

1. (1880) I. L. R. 5 B. 22.
2. (1907) I. L. R. 29 A. 471.
3. (1898) I. L. R 23 M. 33.
4. (1906) 16 M. L. J. 146.
5. (1908) I. L. R. 36 C. 828.
6. (1914) I.L.R. 36 A. 195. (P C.)
7. (1914) 27 M. L. J. 483.

Sathyabhama v. Kesavacharya.

Where in a suit brought by a Hindu widow against her deceased husband's brother for maintenance, the amount of which had been fixed by agreement it was found that after the date of the agreement, the plaintiff had led an immoral life but that, at the time of the suit, she had reformed her ways and was living with her people.

Held, that the plaintiff was not entitled to the rate of maintenance provided in the document but was entitled to a starving allowance.

Nagamma v. *Virabadra* [1], *Kandasami Pillai* v. *Murugammal* [2] distinguished.

S. A. No. 725 of 1912 followed.

Second appeal against the decree of the District Court of South Canara in A. S. No. 46 of 1913, preferred against the decree of the Court of the District Munsif of Puttur in O. S. No. 334 of 1912.

H. Balakrishna Rao for appellant.

B. Sitarama Rao for respondent.

The Court delivered the following

Judgment :—This is a suit by a widow against her deceased husband's brother for maintenance. There was an agreement on the 30th April 1906 by which the amount was fixed. The plea of the defendant is that since the date of the agreement the plaintiff had been leading an immoral life and that consequently she is not entitled to claim maintenance. The Courts below have found that she did lead an immoral life, but that, at the time of the suit, she had reformed her ways and was living with her people. Mr. B. Sitarama Row wanted to argue that she had gone wrong with a Sudra, that that entails upon her degradation from caste and that consequently she is not entitled to any maintenance. But there is no finding that the pregnancy which is found, was caused by cohabitation with the Sudra. We cannot allow that question to be argued in Second Appeal.

On the facts found by the Courts below, the question for consideration is, whether the plaintiff is not entitled to what is called, "starving allowance' from the defendant. It was argued in appeal that the fact that the maintenance was secured by a deed differentiated this case from *Nagamma* v. *Virabadra* [1]. We cannot accept this contention. The instrument is only evidence of the amount which is payable as maintenance. The basis of the claim against the defendant being the duty to maintain, the fact that it is secured by a deed in writing is not a reason for holding

1. (1894) I. L. R. 17 M. 392. 2. (1895) I. L. R. 19 M. 6

Sathyabhama v. Kesava-charya.

that subsequent unchastity would not work a forfeiture. The decision in *Bhup Singh* v. *Luchman Kunwar* [1], related to a compromise which was arrived at regarding the claim of the widow for possession of the property as heiress. It was held that the subsequent unchastity of the widow did not deprive her of this property. That decision has no bearing upon the present case. The right to maintenance is dependent upon texts which do not affect succession or inheritance.

There is no direct authority upon the question. The text of Manu in Chapter XI, S. 189 applies to all women entitled to maintenance. Under that text if a woman becomes unchaste she is entitled to a starving allowance. The Prayaschitta Kanda of Yagnavalkya Smrithi, (verses 297 and 298) lays down the rules regarding provisions to be made for women who have misconducted themselves. It has been suggested by the learned vakil for the respondent that these verses only apply to cases of women who have committed sins other than immorality ; but the concluding portion of the commentary of Vijnaneswara on the Smrithi makes it clear that the two verses are intended to cover cases of unchaste women. The commentary is this: "To those women, who, though have suffered degradation (from caste) and for whom the rite of presenting (disconnecting) water-libations, etc., have been performed, accommodation, (that is), a small cottage built of straws and leaves should be given in the proximity of the main (building of the) house. Similarly food that is just sufficient for the maintenance of life and also raiment of a low description *along with (the protection of) preventing her from being enjoyed again by another man should be given.*" This last sentence makes it clear beyond doubt that the commentator had in mind the case of fallen women. The text and commentary it is conceded, apply to all women alike whether they be wives, widows of coparceners or mothers. Therefore according to Manu and Yajnavalkya women who have gone wrong should be given some maintenance. The punishment for their unchastity is that they lose their right to the ordinary rate of maintenance. As against these two texts, the well-known text of Narada has been quoted which says that if a widow of a coparcener is guilty of immorality, her maintenance should be resumed. This statement is quoted and commented upon by all the Smrithi writers (Mayuka

1. (1904) I. L. R. 26 A. 321.

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S. 8, placitum 6, Smrithi Chandrika, chapter XI, S. 34 and Viramitrodya chapter III, Part I, S.10). But in none if these texts is there a provision for a woman who repented and was subsequently leading an honest life.

It is not to be presumed from the omission to provide for such a contingency, that the resumption once made is to be irrevocable and that the fallen woman who had reformed is to be denied even a starving allowance. This question was raised in *Visalatchi Ammal* v. *Annasami Sastri* [1], but was left undecided. In *Nagamma* v. *Virabadra* [2], the learned Judges following certain Bombay decisions held that a widow who had misconducted herself was not entitled to maintenance. In the latest Bombay case *Parami* v. *Mahadevi* [3], the earlier cases are not approved. In the Madras case, the question whether subsequent reformation would make any difference was not considered. In *Kandasami Pillai* v. *Murugammal* [4], the learned Judges based the decision on the ground that the fallen woman had tried to foist upon her husband a child who had been born of adulterous intercourse; and it was decided that such a woman was not entitled even to a starving allowance. This decision in *Kandasami Pillai* v. *Murugammal* [4], was considered by Miller and Sankaran Nair, JJ., in S. A. No. 725 of 1912, and the learned Judges were of opinion that it should be confined to cases where the woman was continuing to lead an immoral life. In *Nagalakshamma* v. *Visvanatha Sastri* [5], the wife was not shown to have repented of her misconduct. Mr. B. Sitarama Rao argued that the decision in S. A. No. 725 of 1912 should not be extended to widows of coparceners. As pointed out already, both the text of Manu and that of Yajnavalkya make no distinction between wives and other women, and we see no reason on principle why the widow of a coparcener should be in a less advantageous position than the wife on the question of being allotted a starving allowance. There are observations in *Romanath* alias *Ramanund Dhur Poddar* v. *Rajonimoni Dasi* [6], to the effect that widows who had repented of their misconduct should be given a bare maintenance. The recent decision in *Parami* v. *Mahadevi* [3], although it related to the case of a wife contains observations regarding the rights of other

1. (1870) 5 M. H. C. R. 150
2. (1894) I. L. R. 17 M. 392.
3. (1909) I. L. R. 34 B. 278.
4. (1895) I. L. R. 19 M. 6.
5. (1912) 23 M. L. J. 289.
6. (1890) I. L. R. 17 C. 674 at 678.

women to compassionate allowance. We see no reason for not applying the principle enunciated in that decision to the case before us. We think that the widow is entitled to some maintenance, although she is not entitled to the rate provided for in the deed. The courts below have found that Rs. 24 a year may be awarded to her in this behalf. We accept that finding. We reverse the decrees of the courts below and decree maintenance at Rs. 24 a year, from January 1911 to the date of suit. Each party will bear his or her own costs throughout.

Sathyabh·ma v. Kesavacharya.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Mr. Justice Seshagiri Aiyar and Mr. Justice Kumarasami Sastri.

Andi Moopan and others... *Appellants.* * *(Plaintiffs 1 to 4).*

v.

Muthuveera Reddy and another. *Respondents (Defendants 1 and 2).*

Andi Moopan v. Muthuveera Reddy.

Highway—Processions in—Right to carry—Interference with right—Order of Magistrate prohibiting procession—Suit by aggrieved party for declaration and injunction—Maintainability—Special damage—Proof of—Necessity—C. P. C. of 1908—*O.* 1, *R.* 8—*Sanction under, obtained subsequent to suit—Validity.*

Every citizen has a natural right to conduct religious processions through the public streets. Though this right may be restricted in the interests of public safety, or its exercise may be limited so that it may not infringe the rights of property possessed by others, the burden will lie upon those who claim to impose fetters upon the exercise of such rights to establish the limitation.

Sundaram v. *The Queen* : *Ponnusami* v. *The Queen* [1], *Parthasaradhi* v. *Chinna Krishna* [2], *Sadagopachariar* v. *Rama Rao* [3], referred to.

The right of every citizen to pass through public streets in procession is a civil right.

Vibudariya Thirthaswamy v. *Esocf Sahib* [4], followed, *Kandasami Mudali* v. *Subroya Mudali* [5], referred to.

Where a suit was instituted by four persons claiming to be headmen of the Pallar community of a village for a declaration of their right to go in procession through certain public streets of the village on some specific occasions and for an injunction restraining the defendants, the Hindu inhabitants of the village, who had obtained an order from the Magistrate against plaintiff's passing in procession, from interfering with the exercise of the plaintiff's rights, and the suit was resisted on the grounds, amongst others, that the rights claimed were not of a civil nature and that the suit was not maintainable because there was no allegation of special

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* S. A. No. 115 of 1914. 23rd March, 1915.

1. (1883) I. L. R. 6 M. 203. 2. (1882) I. L. R. 5. M. 304.
3. (1902) I. L. R. 26 M. 376 ; on appeal 30 M. 185 (P.C.)
4. (1910) I. L. R. 35 M. 28. 5. (1909) I. L. R. 32 M. 478.

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damage; *held*, that (1) the suit was of a civil nature, (2) the plaint as framed disclosed a cause of action and it was not necessary to allege or prove any special damage, (3) that the suit was maintainable, even though the plaintiff would have a remedy in the criminal courts on the facts alleged, and (4) that the case was a fit one for the grant of an injunction.

A suit instituted without obtaining sanction under O. 1, R. 8, of the Code of Civil Procedure, 1908, can be validated by such sanction subsequently obtained.

Even in cases where an actual offence is threatened, it is not the law that recourse must be had to the Criminal Courts, before seeking redress in the Civil Courts.

Second appeal from the decree of the Court of the Temporary Subordinate Judge of Trichinopoly, in A. S. No. 64 of 1913, preferred against the decree of the Court of the District Munsif of Kulitalai, in O. S. No 540 of 1909.

S. T. Srinivasa Gopalachari for appellants.

S. Srinivasa Iyengar for respondents.

The Court delivered the following

Judgment :—The suit was originally filed by four persons who styled themselves the headmen of the Pallar community, to establish their right to go in procession through certain public streets on some specific occasions. The Hindu inhabitants of the village to which the parties belong were arrayed as defendants. The defendants denied the right claimed by the plaintiffs. They had obtained an order from the Deputy Magistrate on the 20th July 1909 against the plaintiff's passing in procession through the streets. The District Munsif without taking any evidence came to the conclusion that the defendants had no right, on the pleadings, to obstruct the plaintiffs and relying on the decision in *Kandasami* v. *Subaroya Mudali*[1] gave the plaintiffs the decree as prayed for. On appeal the learned District Judge drew attention to the fact that the suit was not instituted under O. 1, R. 8, and that there was no allegation of any special injury having been sustained by the plaintiffs. He also referred to the fact that the averments of the plaintiffs were not definite regarding the road and the occasions during which the procession had to be carried through. He therefore remanded the case for disposal to the District Munsif. After remand the plaintiffs obtained sanction under O. 1, R. 8. They also filed an additional statement of their claim. The particulars of their right are set out in the revised judgment of the new District Munsif, at page 21 of the printed papers. Broadly

1. (1909) I. L. R. 32 M. 478.

speaking, the claim of the plaintiffs is that they are entitled to proceed in procession from their hamlet along the public streets with music and tom-tom, (1) on the occasion of taking articles of worship to the Hindu Temple, (2) on the occasion of receiving brides and bridegrooms during or after the marriage, (3) on the occasion of taking presents to their masters' houses when any marriage or death took place, and (4) on the occasion of proceeding to the Christian temple to drag the car.

The defendants denied all these rights, and also stated that the rights claimed were not of a civil nature.

The two main issues in the case were (1) whether the reliefs claimed in the plaint are cognisable by a Civil Court, and (2) whether the plaintiffs have established a custom for passing in procession, in the way alleged by them, through the public streets. On these issues the District Munsif came to the conclusion that the rights of the plaintiffs were made out and gave them a declaration and injunction restraining the defendants from interfering with the exercise of the plaintiffs' rights. The Subordinate Judge who heard the appeal rested his judgment solely on the ground that the right claimed by the plaintiffs is not of a civil nature and dismissed the suit. This second appeal has been preferred against his judgment.

We are clearly of opinion that the suit is of a civil nature. Every citizen has an inherent right to conduct religious processions through the public streets. This natural right may be restricted in the interests of public safety ; or its exercise may be limited so that it may not infringe the rights of property possessed by others. The burden will be upon those who claim to impose fetters upon the exercise of such rights to establish the limitation. The principles which have been guiding courts in India in granting relief in such cases have been well laid down by Sir Charles Turner in the cases *Sundaram* v. *The Queen*: *Ponnusami* v. *The Queen* [1]. See also the decision in *Parthasaradhi* v *Chinna Krishna* [2] and the decision in *Sadagopachariar* v. *Rama Rao* [3]. The latter decision was affirmed in appeal by the Judicial Committee of the Privy Council in the case of *Sadagopachariar* v. *Krishnamoorty Rao* [4]. In the case *Veeraraghavachariar* v. *Emperor* [5] Mr. Justice Bashyam Iyengar inclines

1. (1883) I.L.R. 6 M. 203.
2. (1882) I.L.R. 5 M. 304.
3. (1902) I.L.R. 26 M. 376.
4. (1917) I. L. R. 30 M. 185.
5. (1903) I. L. R. 26 M. 554.

Andi Moopan v. Muthuveera Reddy.

to the view that an assembly passing through a highway chanting prayers cannot be said to be engaged in the performance of a religious worship, unless it can be proved that the highway was dedicated subject to such a user. Mr. Justice Subramania Aiyar expresses a more decided opinion and said that the use of a highway for carrying processions is not its natural or legitimate user. In a later case *Kandasami Mudali* v. *Subraya Mudali* [1], Benson and Sankaran Nair, JJ., expressed doubts regarding the correctness of the position taken up by these learned Judges. Having regard to the decision of the Judicial Committee in the case, *Sadagopachariar* v. *Krishnamoorthy Rao* [2] and to the long course of decisions on the question, we must hold that the right of every citizen to pass through public streets in procession is a civil right. The decision in *Vibudapriya Thirthaswamy* v. *Esoof Sahib* [3] supports this view. In the case, *Chandu Datt Vyas* v. *Babunandan* [4], the question did not relate to the right of procession. The Bombay High Court has accepted the view enunciated in the case *Sadagopachariar* v. *Rama Rao* [5] : Vide the decision in *Basalingappa Parapa* v. *Dharmappa Basappa* [6]. The Subordinate Judge is therefore wrong in dismissing the suit on that ground. As he has, however, expressed his concurrence with the findings of fact arrived at by the District Munsif, we shall proceed to deal with the arguments addressed to us in appeal in regard to them.

A subsidiary question was raised on behalf of the respondents that as the plaintiffs alleged no special damage, they had no cause of action to maintain the suit. In the original plaint the plaintiffs asked for a declaration, as headmen of their community, that they were entitled to march in procession through the public streets. The cause of action was the infraction of their individual rights. They also referred to the order passed by the Magistrate prohibiting them from going in procession. Under these circumstances, the plaintiffs were entitled to maintain the suit to vindicate the right denied to them. See the decision in *Muthayya* v. *Sudalaimuthu* [7] and the decision in *Kandasami* v. *Subbaraya Mudali* [1]. In the case *Hussain Sahib* v. *Narasim-*

1. (1909) I.L.R. 32 M. 478. 2. (1907) I.L.R. 30 M. 185 s.c. 17 M.L.J. 240 P.C.
3. (1910) I. L. R. 35 M. 28. 4. (1910) I. L. R. 32 A. 527.
5. (1902) I.L.R. 26 M. 376. 6. (1910) I. L. R. 34 B. 571.
7. (1909) 20 M. L. J. 119.

happa [1], the plaintiff alleged no special injury, but claimed a right which was common to him and to the general public. The learned Judges held that such a suit was not maintainable. The case *Kandasami Koundan* v. *Karuppanna Koundan* [2], lays down a similar proposition. On the other hand, in the case *Siddeswara* v. *Krishna* [3], Mr. Justice Muthusami Iyer points out that although a right litigated may be common to the plaintiff and to the other members of the public, there will be a right of action, if the injury suffered is special to the plaintiff." The case of *Afzul Miah* v. *Nazir Mahammad* [4], emphasises this principle. We are of opinion that the plaint as originally framed disclosed a cause of action which affected the plaintiffs injuriously and that it was not necessary to allege or prove any special damage.

Moreover, whatever, may have been the defect in the original plaint, that has been cured by the permission obtained, after remand, to sue under O. 1, R. 8. It is now settled law that a suit instituted without obtaining sanction under the said order can be validated subsequently.' See *Srinivasachariar* v. *Raghavachariar* [5], *Chennu Menon* v. *Krishnan* [6], *Fernandez* v. *Rodrigues* [7], *Baldeo Bharathi* v. *Birrgir* [8] and *Kalu Kalur* v. *Janmeah* [9]. The objection must be overruled.

It was also contended that as the substance of the grievance amounts to a criminal offence contemplated by the defendants, no civil suit will lie, and that the only remedy was by way of indictment. We see no force in the argument. Even in cases where an actual offence is threatened, it is not the law that recourse must be had to the Criminal Court before seeking redress in the Civil Courts. See the decision in *Exparte Bau, in re Shepherd* [10], and the decision in the *President of the Taluq Board Coondapur* v. *Burdi Lahshminarayana Kampthi* [11]. The decision in *Attorney-General* v. *Sheffield Gas Consumers Company* [12] and the decision in *The Emperor of Austria* v. *Day* [13], were cited to show that that no injunction should be granted in such cases. We do

1. (1912) 23 M. L. J. 539.
2. (1913) 14 M. L. J. 509.
3. (1890) I. L. R. 14 M. 177.
4. (1895) I. L. R. 22 C. 551.
5. (1897) I. L. R. 23 M. 28.
6. (1901) I. L. R. 25 M. 399.
7. (1897) I. L. R. 21 B. 784.
8. (1900) I. L. R. 22 A. 269.
9. (1901) I. L. R. 29 C. 100.
10. (1879) 10 Ch D. 667.
11. (1907) I. L. R. 31 M. 54.
12. (1853) 43 E. R. 119 at 125.
13. (1861) 45 E. R. 861.

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not think that these cases have any application. Under the Specific Relief Act, where the injury is of such a character that pecuniary damage will not afford sufficient relief, or where it is necessary to avoid multiplicity of judicial proceedings an injunction will be granted The present case is eminently a fit one for the grant of such a prayer.

We must reverse the decree of the lower appellate Court and restore that of the District Munsif, with costs in this and in the lower appellate Court.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Seshagiri Aiyar and Mr. Justice Kumarasami Sastri.

Venkataperumal Rau Bahadur Varu, Rajah of Karvetnagar, minor by guardian W. A. Varadachariar. *Appellant* * *in C. M. A. Nos. 286 (to 290 Petitioner).*

v.

Venkata Reddi and others .... *Respondents.* *(Counter-Petitioners.)*

Rajah of Karvetnagar v. Venkata Reddi

Civil Procedure Code, Ss. 47, 73—Order for rateable distribution—Appeal by judgment-debtor—Maintainability—Execution application—Grant of all reliefs prayed for—No formal order of dismissal—Effect—Mortgage decree—Provision for recovery of deficiency from the person and other property of the judgment-debtor—Rateable distribution—Right of decree-holder—Decree, irregular in form, not to be questioned in execution

A party to whom a right of appeal is given (if he comes under S. 47 of the Code of Civil Procedure) should not be deprived of it, unless the Code expressly denies it to him Orders under S. 73 are appealable if they affect parties to the suit.

Sunder Singh v. *Ghasi* [1], *Krishnabhupati* v. *Vikrama Deva* [2], Referred to. *Balmer Laurie & Co.*, v. *Jadunath Banerjee* [3], *Chennamma* v. *Rajah of Karvetnagar* [4], distinguished.

A mortgage-decree (for sale) provided for the recovery of any deficiency that may arise after the application of the sale proceeds towards the mortgage-debt, from the person and other properties of the judgment-debtor. The decree-holder applied for execution in 1905 and obtained all the reliefs he had prayed for. No formal order, however. was passed dismissing the application from the list of pending applications. In 1912, assets were realised in execution of other decrees against the same judgment-debtor and were paid into Court. Thereupon, the mortgagee decree-holder applied for rateable distribution. *Held*, that he was entitled to claim rateable distribution of the assets in respect of the balance of his decree amount

Though all the reliefs asked for by the decree-holder in the application of 1905 had been obtained by him still it was the duty of the Court to have fixed a date for the final disposal of the application and the fact that it had not done so, had the

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* C.M.A. No. 286 to 290 of 1913. 1st April 1915.

1. (1896) I. L. R. 13 A. 410.
2. (1894) I. L. R. 18 M. 13.
3. (1914) I. L R. 42 Cal 1.
4. (1914) I. L. W. 234.

effect of keeping the application of 1905, pending so as to entitle the decree-holder to apply for rateable distribution.

Tiruchittambala Chetti v. *Seshayyangar* 1.

Per Seshagiri Aiyar, J.: The fact that the decree-holder moved the Court only for a particular remedy open to him cannot lead to the inference that he was not entitled to ask that his decree be satisfied by other means which the law enables him to adopt.

Per Kumarasawmi Sastri, J.—The mortgage-decree in question was not in accordance with the provisions of the Transfer of Property Act, but the irregularity could not be questioned in execution proceedings.

Rajah of Kalahasti v. *Venkataperumal* 2 refered to.

Appeals against the orders dated 25th January 1913 of the District Court of North Arcot, in C. M. P. Nos. 898, 899, 900, 901 and 904 of 1912 (E. P. Nos. 124, 88, 133, 135 and 82 of 1905 in O. S. No. 5 of 1897, No. 22 of 1889, No. 11 of 1889, No. 24 of 1889 and No. 11 of 1886 respectively).

The material facts are set out in the judgment of Kumaraswami Sastri, J.

L. A. Govindaraghava Aiyar for appellant.

M. Krishnamachari, V. Parthasarathy Iyangar and *R. V. Venkataramana Rao* for respondents.

The Court delivered the following

Judgment (on the preliminary objection) :—The respondents in these connected appeals obtained mortgage-decrees against the appellant. These decrees provided for the recovery of the balance from the person and the other properties of the judgment-debtor. Certain properties, not included in the mortgage to the respondents, were attached in execution of two other decrees against the same judgment-debtor ; the realised assets were paid into Court. The present respondents applied for rateable distribution and notwithstanding the objection of the judgment-debtor, the applications were granted. The judgment-debtor has appealed. A preliminary objection is taken that as the order was passed under S. 73 of the Code of Civil Procedure, against which no appeal is provided by S. 104 of the Code, no appeal should be entertained. It is conceded that the question agitated in these applications relates to the execution of the decrees between the parties to the suits in which the decrees were passed. *Prima facie*, therefore, the order is appealable as falling under S. 47 of the Code of Civil Procedure. Has that right of appeal been taken away in the present case by S. 73? That section does not say that no

1. (1881) I. L. R. 4 M. 383. 2. (1911) 21 M. L. J. 1036.

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appeal shall lie against orders passed under it. It is by the omission to provide for an appeal in S. 104 that it is argued that an appeal is not given against the order. It has been held with reference to orders passed under O. XXI, R. 63, that if the adjudication was between the parties to the suit, although the matter may arise in a claim petition, an appeal will lie under S. 47 of the Code of Civil Procedure. This principle was recognised both under the old and the new Codes. See *Sunder Singh* v. *Ghasi* [1] *Krishnabhupati Deva* v. *Vikrama Deva* [2], *Vengappayyan* v. *Karimpavakal Parvali* [3], and *Kali Prasanno Ghosh Shaikh* v. *Shaikh Golam Rahman* [4]. On the analogy of these decisions, we are of opinion that orders passed under S. 73 of the Code of Civil Procedure are appealable, if they affect parties to the suits. In *Jagadish Chandra Saha* v. *Kripanath Saha* [5], and *Kashi Ram* v. *Mani Ram* [6], the contest was between rival decree-holders. They are not governed by S. 47 of the Code of Civil Procedure. This distinction was pointedly referred to in *Balmer Lawrie and Co.*, v. *Jadunath Banerjee* [7]. But our attention was drawn to the judgment of Sankaran Nair and Ayling, JJ., in *Chennamma* v. *Rajah of Karvetnagar* [8], which at first sight appeared to be direct authority in favour of the respondents. In that case, the appellant was one of the decree-holders. To him the provision of clause (2) of S. 73 of the Code of Civil Procedure will apply, and he can have the remedy by way of suit if the order goes against him. The judgment-debtor cannot avail himself of the right of suit which that sub-clause provides. The present case may be distinguished from *Chennamma* v. *Rajah of Karvetnagar* [8] that ground. We think that a party to whom a right of appeal is given, if he comes under S. 47 of the Code of Civil Procedure should not be deprived of it, unless the Civil Procedure Code expressly denies it to him. As we find no such denial in S. 73 of the Civil Procedure Code, we must hold that an appeal lies. We overrule the preliminary objection.

[The appeals then came on for hearing on merits on the same day (19th March, 1915).

1. (1896) I. L. R. 18 A. 410.
2. (1894) I. L. R. 18 M. 1. 31.
3. (1902) I. L. R. 26 M. 501.
4. (1914) 18 C. W. N. 910.
5. (1908) I. L. R. 36 C. 130.
6. (1892) I. L. R. 14 A. 210.
7. (1914) I. L. R. 42 C. 1.
8. (1914) 1 L. W. 234.

Rajah of Karvetnagar v. Venkata Reddi.

Seshagiri Aiyar, J.

The Court delivered the following

Judgments :—*Seshagiri Aiyar, J.* :—I have had the advantage of reading the Judgment which my learned brother is about to deliver. I entirely agree with his conclusions. The respondents are entitled to rateable distribution, even though their decrees are on mortgages. The order for payment of the amount from the person and the other properties of the judgment-debtor was also obtained in these cases. See *Abdulla Sahib* v. *Doctor Oosman Sahib* [1], and *Gatti Lal* v. *Bir Bahadur Sahai* [2]. It is not disputed that no formal order was passed disposing of their execution applications. Under the old Code of Civil Procedure, it was held that even when an application was "struck off," it must be taken to be still pending, as the law provided no procedure for taking such a step, *Sasivarna Tevar* v. *Arulanandam Pillai* [3]. In the present Code, there is an express provision for dismissing an execution application when no further step is taken by the decree-holder. It is clear, therefore, that until that step is taken uuder the new Code, the application is on the file of the Court. The fact that the decree-holder moved the Court only for a particular remedy open to him cannot lead to the inference that he was not entitled to ask that his decree be satisfied by other means which the law enables him to adopt. The District Judge is right in treating the applications of the respondents as pending at the time that the claim for rateable distribution arose. These appeals must be dismissed with costs. There will be no costs in C. M. A., 289.

Kumaraswami Sastri, J. :—These are appeals against the orders of the District Judge of North Arcot, declaring that the respondents are entitled to rateable distribution out of the sale proceeds realised in E.P. Nos. 78 of 1905 and 108 of 1906. The respondents obtained mortgage decrees against the appellant which directed that the judgment-debtors should be personally liable for any deficiency that may arise after the sale proceeds have been applied towards the amounts due on the decrees. Though the decrees were not in accordance with the provisions of the Transfer of Property Act, the irregularity cannot be questioned in execution proceedings. *Raja of Kalahasti* v. *Venkataperumal Rajah* [4]. The respondents had, therefore, decrees for money and would be entitled to rate-

1. (1904) I. L. R. 28 M. 224. s. c. 14 M. L. J. 401. 2. (1904) I. L. R. 27 A. 158.
3. (1897) I. L. R. 21 M. 261. s. c. 8 M. L. J. 18. 4. (1911) 21 M. L. J. 1036.

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able distribution if they had applied for execution and their applications were still undisposed of, and on the file at the date when assets were realised in execution of the decrees in E. P. Nos. 78 of 1905 and 108 of 1906. *Tiruchittambala Chetti* v. *Seshayyangar* [1].

The respondents in 1905 filed execution applications on the decrees obtained by them which prayed for (1) issue of notices to the judgment-debtors under S. 248 of the Old Civil Procedure Code, and (2) sale of the mortgaged properties, leave being given to the decree-holder to bid. Orders were passed granting the reliefs and it is admitted that the decree-holders obtained all the reliefs they had prayed for. For some reason or other, (not explained) no formal orders were passed taking the petitions off the file of pending execution applications and the District Judge, treating the applications as pending, ordered reteable distribution on the applications of the decree-holders.

The question for decision is, whether execution applications, praying for specific reliefs which were all granted several years before assets were realised, and on which no further reliefs could be asked or granted, can be said to be still on the file and undisposed of, because no final orders have been passed taking them off the file of pending applications.

The point is not free from difficulty. When an execution petition is filed, and the Court either rejects all or some of the prayers, it has to pass final orders to that effect. If all, or any of the prayers are granted, the decree-holder has to obtain the appropriate reliefs by taking further steps either on the execution petition or in interlocutory application on the execution petition. When he has obtained all the reliefs he asks for, all that remains to be done on the execution-petition is to regard the fact that the petition has been disposed of. The court cannot do anything further. It is argued by Mr. Govindaraghava Aiyar that anything that the Court might do after all the prayers have been granted and reliefs sought obtained by the decree-holder will only be purely ministerial and for statistical and not judicial purposes. There can be little doubt that only a formal order can be passed on the petition after all the reliefs prayed for have been granted and obtained by the decree-holder; but it does not follow

1. (1881) I. L. R. 4 M. 383.

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that the order is not a judicial order simply because it records that the execution petition has been disposed of. Many purely formal orders are still judicial and not ministerial. The Madras Civil Rules of Practice contemplate final orders being passed on execution petitions. Rule 167 of the Civil Rules of Practice requires that, when orders for sale are passed, the execution petition shall be adjourned to a fixed date and clearly contemplates final orders being passed by the Court on the petition after the sale has been confirmed.

It was the duty of the Court to have fixed a date for the final disposal of the execution petitions and the fact that it did not do so has the effect of keeping the applications pending till final orders are passed.

I am of opinion that the District Judge was right in treating the execution-petitions as pending and dismiss the appeals (except C. M. A. 289) with costs.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

[FULL BENCH.]

Present :—Mr. Justice Oldfield, Mr. Justice Seshagiri Aiyar and Mr. Justice Napier,

The Public Prosecutor ... *Appellant**

v.

Kottaparambath Maliyakkal Kadiri Koya Haji. *Accused.*

Public Prosecutor v. Maliyakkal Kadiri Koya Haji

Criminal Procedure Code, S. 233—Joint trial of two separate calendar cases—Illegality—S. 537, Applicability of—Practice—Division Bench of High Court hearing criminal cases—Power to entertain appeal though Admission Court sitting.

The fact that a single Judge sitting in the admission Court is admitting Criminal appeals does not preclude the Bench disposing of criminal work from entertaining appeals presented through the Bench Clerk.

Powers of Benches are to be determined by reference to the rules made by the High Court and not by the notes in the cause list which are merely instructions for the guidance of parties and practitioners.

Where the magistrate framed separate charges and also numbered them as distinct cases, but when the witnesses came to be cross-examined he lost sight of the necessity of keeping the two trials separate and allowed the witnesses to be cross-examined promiscuously in respect of both the charges.

Held, that the trial was illegal and the illegality could not be cured by S. 537, Criminal Procedure Code.

Where after an illegal trial, the accused are acquitted and an appeal is preferred, the High Court cannot itself convict the accused, but can only direct a re-trial.

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* Cr. A. No. 159 of 1915 13th April 1915.

Public Prosecutor v. Maliyakkal Kadiri Koya Haji.

Oldfield, J.

In this case their Lordships refused to direct a re-trial having regard to the time that had elapsed from the date of the alleged offence.

Per Napier, J. Obiter.—The decision in *Subramania Aiyar* v. *King-Emperor* does not compel the court to hold that in no case a misjoinder of charges or a failure to try charges separately can be an irregularity within the meaning of S. 537, Criminal Procedure Code, but that Section cannot be availed of in an appeal against acquittal so as to justify the Court in convicting the accused on the appeal.

Appeal under section 417 of the Code of Criminal Procedure, 1898, against the acquittal of the aforesaid accused by the Additional District Magistrate of Malabar, in Calendar Case No. 4 of 1914 on his file.

This Appeal came on for hearing on Wednesday, Thursday, Friday, Monday and Tuesday, the 21st, 22nd, 23rd, 26th and 27th days of April 1915.

Public Prosecutor *Nugent Grant* in person.

T. Richmond and *E. Ramaswami Mudaliar* for the accused.

The Court delivered the following

Judgments :—*Oldfield, J.*—The accused has been acquitted in C. C. No. 4 of 1915 on a charge of offence punishable under S. 420, Indian Penal Code, by the Additional District Magistrate of Malabar. A learned Judge thought it necessary to take up the case in the exercise of this Court's powers of revision. Whilst it was under the consideration of a Bench, Government instructed the Public Prosecutor to file the appeals, which are before us against the acquittal in C. C. No. 4 and C. C. No. 5, a connected case. I deal at present with the former.

A preliminary objection to the hearing of both appeals has been made that they were not legally presented and that they cannot be proceeded with, because the provisions of S. 421 of the Code of Criminal Procedure have not been complied with, inasmuch as the appeals were not duly presented to this Court and they were not perused and notice was not ordered by a Judge empowered for those purposes. The facts are that the Bench above referred to issued notice to the Public Prosecutor to appear at the further hearing of the revision case and also to inform the Court whether Government intended to appeal. He appeared and then handed in the appeals by Government now under disposal to the learned Judges, who perused them and ordered notice forthwith.

1. (1901) I. L. R. 25 M. 61.

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Oldfield J.

As regards presentation no special method is enjoined in the Code of Criminal Procedure; and therefore the question is one of administrative convenience alone. So long as there is, as there was in this case, an actual presentation to an officer of the Court, such as a Bench Clerk or to one of the Judges, its members, I am not prepared to hold that the presentation was invalid. As to compliance with S. 421, the accused relies on the note published as part of the weekly sittings list "Urgent Criminal Appellate Side motions will be heard by the Bench before which the Criminal work of the week is posted (and must be moved at 11 A. M.), unless an admission Court is sitting in which case, if the motion can be heard by a single Judge, the application must be made before the admission Court" and argues that, as an admission Court constituted by a single Judge, was sitting on 15th March 1915, the date on which orders were passed under S. 421, that Court alone, and not the Bench of two Judges, was competent to peruse the appeals. It is a sufficient answer to this objection that under Section 13, Charter Act, rules for the exercise of the High Court's appellate jurisdiction by one or more Judges or by Divisional Courts can be made only by such High Court, the powers of the Chief Justice being only those conferred by S. 14 to determine which Judges shall sit alone and which in Divisional Courts. It is by reference to the rules so made that the respective powers of Judges sitting alone and of Divisional Courts must be ascertained, not by reference to the notes to the sitting list, which are merely instructions for the guidance of practitioners and parties. The rules made by this Court are contained in the Appellate Side Rules; and under Rule 1 (1) (f) applications for the admission of appeals from the judgment of any Criminal Court are ordinarily to be made before a single Judge. This does not in terms, and is not intended to, deprive the Divisional Court, constituted for the disposal of Criminal business, of the right to exercise its powers in special cases, such as those before us, in which convenience and the acquaintance with the circumstances, which the two learned Judges concerned had, rendered their intervention specially advisable. This objection must therefore fail.

I turn next to an argument relating to the conduct of the proceedings in the lower Court, on which Mr. Richmond, who appeared for the accused has relied, as a comprehensive answer to

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Oldfield J.

the appeal, in so far as the substitution of a conviction for the acquittal is asked for, and not merely an order for a re-trial. The relevant facts are that both C. C. No. 4 and C. C. No. 5 were instituted by the same complainant by the presentation of only one complaint, containing all the allegations necessary to the establishment of both cases, those allegations being shortly that accused had cheated the Bank of Madras in connection with certain bills of exchange and also by a false representation, contained in Exhibit K as to the amount of his assets. The Magistrate in spite, Mr. Richmond alleges, of his remonstrances recorded the prosecution evidence tendered on behalf of the complainant continuously without discriminating between that which was relevant on each of these two charges, examining each witness once as to all he knew regarding both and questioning accused under S. 342 Criminal Procedure Code, only once. He then, as his diary shows, "split" the case into C.C. Nos. 4 and 5 and proceeded to the further cross-examination of the prosecution witnesses, which accused had claimed under S. 256 (1). It is not clear whether he bore in mind that he had two distinct cases to try during the cross-examination of 1st prosecution witness. For part of it is headed C. C. No. 5. But his attempt to do so, if he made one, was ineffective, since that part of the cross-examination is in fact relevant rather to C.C. No. 4. And in any case the attempt was abandoned almost immediately, no such distinction being made in the cross-examination of third prosecution witness, who deposed regarding both the bills and Exhibit K, or of other witnesses. Subsequently one written statement was filed by the accused under S. 256 (2), and both cases were disposed of in one judgment. Mr. Richmond argues that this was one trial of separate charges of distinct offences, which offended against S. 233; that the trial was therefore not a legal one; and that, before accused can be convicted by this or any Court, a legal trial must be held.

There is no doubt that the offences in question in the two cases were distinct, and it is not suggested that Ss. 234, 235, 236 or 239 is applicable. It is also in my opinion the fact, although two charges were framed, one trial only was held. For except in that respect the proceedings were, as pointed out above, in every way similar to those, which would have taken place in one trial. It has not been shown how S. 233 is not in point; and accordingly the learned Public Prosecutor's efforts have been

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directed mainly towards establishing that there is in question only an irregularity, to which S. 537 is applicable.

This contention requires close scrutiny, because the effect of the leading case on the subject, *Subramania Ayyar* v. *King Emperor* [1], is to discountenance any liberal application of the section and because it is in terms inapplicable, as the Public Prosecutor would apply it here, to sustain the validity of a trial, attacked by the accused only incidentally and not to resist directly a claim to the reversal or alteration of a decision in reference, appeal or revision. And there is in any case the direct objection, which I state in words borrowed from the decision already referred to :—" When the Code positively enacts that such a trial as that which has taken place here shall not be permitted," it cannot be said " that this contravention of the Code comes within the description of error, omission or irregularity. " This principle was applied to facts resembling those now in question in essential respects in *Gobind Koeri* v. *Emperor* [2], and *Raman Behari Doss* v. *Emperor* [3], the latter case being authority also for a strict construction of S. 233. The only conclusion I can reach is that S. 537 is inapplicable; and it is therefore useless to follow the Public Prosecutor in his contentions that no failure of justice has been occasioned by what occurred or that the accused did not raise his objection to it at a sufficiently early stage in the proceedings.

As accused has undergone no legal trial, he cannot be convicted and sentenced by us; and if we are to take action, the only course open to us is to order that he be tried a second time. It is no doubt true that in two respects the case is one, in which interference with a decision of acquittal could be justified. For it is one of public importance since the establishment of the charge would mean that accused profited largely by conduct subversive of the existing system of mercantile credit; and it is not in my opinion legitimate in one judgment to hold that accused has not been tried legally and to reach a conclusion that he is guilty though the full argument we heard on the merits demonstrated that the Magistrate dealt most inadequately with one question of fundamental importance and never came to close quarters with the evidence. On the other hand the charge deals with events in October 1910 and was made over three years later on the 15th

1. (1910) I. L. R. 25 M. 61. 2. (1902) I. L. R. 29 C. 385.
3. (1910) I. L. R. 41 C. 722.

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May 1914. The explanation given for this delay is that accused's accounts and other documents, on which the prosecution largely depends were not accessible to the complainant Bank, until proceedings in another case against accused had ended in this Court in September 1912. But I am not satisfied that the subsequent interval is not excessive; and it is clear that after so long accused would labour under great disabilities. In the circumstances I do not think that the case is one for retrial. In my opinion therefore the appeal must be dismissed.

Seshagiri Aiyar, J:—I have come to the same conclusion. Mr. Richmond has raised the objection that the appeal is not properly before us. The facts he relies on for this contention are these. The Public Prosecutor presented the appeal petition to Spencer and Coutts-Trotter, JJ., in court through the Bench Clerk on the 15th March 1915. On that date, Mr. Justice Ayling was sitting in the admission Court. Consequently it was not competent to the learned Judges to admit the appeal.

Before dealing with the objection, a few further facts may be stated. Under the orders of a learned Judge of this Court, the records of the present case were called for by the High Court. It was numbered as Criminal Revision Case No. 782 of 1914. On the 4th March, the learned Judges who heard the case sent a notice to the Public Prosecutor calling upon him to inform the Court whether the Government was prepared to file an appeal against the acquittal and whether he would make any further representation in the matter. The Revision Case was adjourned to the 15th March. On this latter date, the incident referred to by Mr. Richmond took place. It is conceded that Spencer and Coutts-Trotter, JJ., were constituted a Bench for hearing Criminal Cases for the week in which the appeal was presented.

Mr. Richmond's first contention is that there was no valid presentation of the appeal. I am unable to agree with this argument. S. 419 contemplates a presentation by the appellant or his pleader. The petition of appeal was handed over to the clerk present in Court by the Public Prosecutor. It has not been shown that the clerk had no authority to receive the appeal petition. Even if it be said that the presentation was to the Judges, direct I am unable to see why it is not a presentation to the High Court. Moreover, the learned Judges who heard the revision petition

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having issued the notice were certainly competent to receive the appeal which was presented to them in pursuance of that notice. There is no force in this contention.

The second argument rests on the fact that in the note appended to the cause list for the week, it is stated that all applications relating to criminal matters should be made before the Judge sitting in the Admission Court, and that consequently the presentation of the appeal for admission to the two learned Judges while there was an Admission Court was improper. Speaking for myself, I accept the contention of the learned Counsel that when the Public Prosecutor presented the appeal petition to the learned Judges he moved for its admission. Rule 1 of the Appellate Rules of Practice speaks of it as an application. I do not think that the admission of the appeal is a partial hearing of the appeal itself. I proceed on the assumption that when an appellant asks the Court to admit an appeal, he is making an application in a criminal matter. In this case, it was an urgent application, as the hearing of the Revision Petition which was stayed depended upon the admission of the appeal. The question then arises, whether the Criminal Bench was deprived of jurisdiction to admit the appeal because an Admission Court was sitting. The rule only says that ordinarily all applications of this kind should be heard by the Admission Judge. Under clause 13 of the Charter Act, the High Court can make rules for the exercise, by one or more Judges, of the Original and Appellate Jurisdiction vested in the Court. Clause 14 empowers the Chief Justice to determine what Judge shall sit alone and what Judges can constitute a Bench. It was under this clause, the two learned Judges were constituted a bench to hear and determine criminal cases. They had jurisdiction to dispose of all criminal matters during the week of their sitting. Their jurisdiction was not taken away, because a single Judge was entrusted with the duties of admitting appeals. Stress was laid on the footnote to the cause list to which I have already referred. I have no hesitation in saying that it was not intended to restrict the powers of the Benches constituted for the week. It was only an intimation to the practitioners as to the course they should adopt. It may be taken also as a suggestion to the Benches not to encourage applications made to them otherwise than in accordance with the note. Every Judge of the High Court would certainly act on the suggestion. But

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there can be no warrant for arguing that this note deprives the Criminal Bench of its jurisdiction to hear applications. There is nothing in S. 14 which would enable such a limitation being placed on the powers of a Bench. Clause 36 of the Letters Patent on which Mr. Richmond relies is not against this view. As pointed out in *Kaladhar Maiti* v. *Choytonna Maiti* [1], the Chief Justice has power to constitute a Bench even in the absence of rules made under clause 13; and when a Bench is constituted, it has jurisdiction to hear applications and appeals in criminal cases. I agree in holding that the appeals were properly before us.

Mr. Richmond finally contends that even if we are satisfied that the judgment of the lower Court is wrong, we ought not to convict his client of the offences charged, as the trial was illegal in that it contravened the provisions of S. 233 of the Code of Criminal Procedure. It is to be regretted that such an objection should be taken at this late stage.

Mr. Richmond states that he objected at the outset to evidence being let in without specifying the charges on which the accused is to be tried. Although there is authority for the position (see *in the matter of Govindu and another* [2], that the letting in of evidence before framing a charge in respect of separate allegations is not obnoxious to S. 233 of the Code of Criminal Procedure, I think that the procedure is not calculated to advance justice. In *Sriramulu* v. *Veeresalingam* [3], and in *Palaniandy Goundan* v. *Emperor* [4], it was laid down that a trial commences only after the charge is framed. It is no doubt true that as the accused pleads only to the charge, his trial commences really after the charge. None the less, he is practically on his trial from the moment the prosecution starts the case. However that may be, in this case we are concerned only with what happened after the charge was read out. The Magistrate rightly enough framed separate charges and numbered the cases as Calendar Cases Nos. 4 and 5 of 1914. But when the witnesses came to be cross-examined, he lost sight of the necessity for keeping the two trials separate and allowed the witnesses to be cross-examined promiscuously in respect of both the charges. I do not think the fact that he noted the further cross-examination of the 1st witness as in Calendar Case No. 5 is

1. (1903) I.L.R. 30 C. 588.
2. (1902) I. L. R. 26 M. 592.
3. (1914) 27 M. L. J 589.
4. (1909) I. L. R. 32 M. 218.

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of any consequence, because that examination was not in reference to the charge framed in that case. Under these circumstances, there can be no doubt that the trial offends against the provisions of S. 233.

It was argued by the learned Public Prosecutor that as the reading of the charge and the numbering of the cases were not improper, the further irregularity in not recording evidence separately did not vitiate the trials. The section says that each charge shall be tried separately and the failure to conform to it at any stage of the trial renders the proceeding illegal. See *Subramania Aiyar* v. *King-Emperor* [1], *Gobind Koeri* v. *Emperor* [2], and *Raman Behari Doss* v. *Emperor* [3]. In *Emperor* v. *Madan Mandal* [4], the learned Judges point out that the mode of trial was wrong, the proceedings ought to be set aside.

Mr. Grant's more serious contention was that S. 537 cured the defect. In the first place, the section has no application. The language of the first part of the section is against the conclusion which the Public Prosecutor asks us to adopt. In the second place clause (*a*) which speaks of error "in proceedings before or during trial" does not cover cases where the trial itself is defective. Consequently, the explanation which introduces the principle of acquiescence under certain circumstances has no application. Moreover as the Judicial Committee has held that a violation of a plain provision of law is not an irregularity, the section has no application to the present case. In *Moharuddi Malita* v. *Jadu Nath Mandul* [5], the error related to the framing of the charge which is distinctly dealt with in clause (a) of S. 537 of the Code of Criminal Procedure. Moreover in that case, the trial was perfectly regular. I am therefore of opinion, that the joint trial of the two calendar cases is opposed to S. 233, and that consequently the accused should not be convicted of the offences charged against him.

I feel little doubt on the records before us that the accused is guilty of at least two out of the three counts mentioned in the charge in Calendar Case No. 4. Ordinarily such a failure of justice would warrant a retrial of the accused. But the offence took place in October 1910, and the accused has been before the Criminal Courts on three occasions. Under these circumstances, I agree in holding that it is not desirable to direct a retrial.

1. (1901) I. L. R. 25 M. 61.
2. (1902) I. L. R. 29 C. 385.
3. (1914) I. L. R. 41 C. 722.
4. (1914) I. L. R. 41 C. 662.
5. (1906) 11 C. W. N. 54.

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Napier, J.—I concur. I do not however think that the decision of the Privy Council in *Subramania Iyer* v. *King Emperor* [1], compels us to hold that in no case can a misjoinder of charges or a failure to try charges separately be an irregularity within the meaning of S. 537 of the Code of Criminal Procedure. In the manner in which this case comes before us that section however cannot be relied on, and we have only to apply S. 233. The only question that remains is what course we must adopt, being satisfied (1) that the accused has been tried illegally, (2) that his acquittal on the merits on two of the charges was wrong, (3) that in the circumstances we do not think that he should be retried on those charges. It seems to me that we must do what the lower Court could have done if its attention had been drawn to the illegality of the trial before judgment, that is, acquit the accused, which in our position, is done by dismissing the appeal.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Sir John Edward Power Wallis, Kt. Chief Justice and Mr. Justice Tyabji.

In re The Swadeshi Steam Navigation Co., Ltd.

S. V. Nallaperumal Pillai. ... *Appellant (Debenture claimant No. 23). In A. A. O. No. 24 of 1914.*

v.

S. D. Krishna Aiyangar and another. *Respondents (Petitioner and the Official Liquidator of the Swedesi Steam Navigation Co., Ltd.)*

Nallaperumal Pillai *v.* Krishna Aiyangar.

Company—Debentures—Floating charge—Provision that authority to carry on business should cease on default—Business carried on notwithstanding—Charge in favour of officers for salary—Not registered—Validity of—Companies Act, (Act VI of 1882) S. 68.

Where a debenture-deed after charging the assets of the Company and providing that notwithstanding such charge, the Company should have the power to carry on business and deal with the assets of the Company until default should have been made for 6 months in the payment of the principal, provided that from and after the happening of such default the liberty to carry on the business should forthwith cease and determine and the charge created by the debenture should be immediately enforceable but notwithstanding such default, the debenture-holders did not intervene but allowed the business to go on. *Held*, that a charge created in favour of the Secretary and Manager of the Company for their salary which is incidental to the carrying on of business could not be avoided on the ground that the floating charge had already crystallised.

*A. A. O. No. 24, 25, 29 to 32 of 1914. 30th April 1915.

1. (1901) I. L. R. 25 M. 61.

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But, *held*, that in this case the charge being in favour of the officers of the Company, they could not take advantage of it, as it was not registered as required by S. 68 of the Companies Act.

Appeals against the orders of the District Court of Tinnevelly, dated the 22nd day of December 1913, in E. P. Nos. 39, 42, 39, 39, 39, 42 of 1913 respectively in O. S. No. 307 of 1911.

[The facts fully appear from the Judgment].

S. Srinivasa Aiyangar (with him *K. Srinivasa Iyengar* and *R. Narayanaswami Iyer*) for the appellant contended that ordinarily a floating charge does not become an active security until a receiver is appointed or there is a cessation of business. Where, however, the debenture provides that the charge should become enforceable forthwith on the happening of certain events, then no act on the part of the debenture-holder is necessary for the charge to crystalise. The question is one of the construction of the debenture in question. In the present case, the parties expressly agreed that in certain events the charge should crystalise without any further act on the part of the debenture-holder. *Government Stocks Investment Co.* v. *Manilla Railway* [1]. Ref. to. The case in *Edward Nelson & Co.* v. *Faber & Co.*[2] is distinguishable because there was no clause in that case like cl. (2) in the debenture in the present case. It was not a clause in the debenture itself. It was appended to the licence clause. Palmer's Company Law, p. 82. Rule 6 on p. 309 of Palmer's book (1911 Edn.) correctly summarises the law.

[*The Chief Justice* :—*Edward Nelson & Co.* v. *Faber & Co.* [2] decides that the provision in the debenture that the charge should in certain events become enforceable forthwith is not an agreement to the contrary.]

But that case does not consider that point. In Stiebel on Company Law, p. 426, the decision in *Nelson's case* is cited as an

Conditions of the debenture.

(2) If the Company shall make default in the payment of interest on this debenture for the period of 6 calender months after the same shall become due, or if the Company shall cease to carry on its business, or if any of the property subject to this security shall be taken in execution or otherwise by operation of law be taken out of the control of the Company or if an order shall be made, or a resolution passed for the winding up of the Company, the principal monies hereby secured shall immediately become payable.

(6) Notwithstanding the charge hereby created, the company shall be at liberty, in the course of its business, and for the purpose of continuing and carrying on the same, to use employ, sell, lease, etc. until one or more of the contingencies specified in condition No. (2) shall have risen, or until default shall be made for six months in the payment of any principal money secured. From and after the happening of such contingency or such default, the liberty and authority to the Company hereinbefore given shall forthwith cease and determine, and the charge by this debenture created shall and may be immediately enforceable.

1. (1897) A. C. 81, 86. 2. (1903) II K. B. 367.

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authority only for the general proposition and not for the point now before your lordships. The words "forthwith" and "immediately" in the debenture make all the difference. I rely on the judgment of Buckley L. J. in *Evans* v. *Rival Granite Quarries Co., Ltd.* [1]. If the decision of Joyce J., is to be followed, it will mean that no sort of language whatever can get a charge out of the nature of a floating charge. *Florence Land Co. Ex parte Moore* [2], *Illingworth* v. *Houldsworth* [3], (1912) A.C. 52 (68) approving of the observation of Buckley L. J. in *Evans* v. *Rival Granite Quarries* [1]. ref.

If the parties in unambiguous terms agree that the licence is to be put an end to in certain cases, then to hold that it is not put an end to in those cases is not to enforce the contract between the parties but to make a new contract for them. (1914) 1 Ch. 954. I also contend that the Company had ceased to do business. As to what will amount to cessation of business, see *Hubbuck* v. *Helms* [4]. In the present case the Company had agreed to sell its business and that is enough.

Further, the charges in favour of the contesting claimants being unregistered, they cannot, under the Explanation to S. 68 of the Companies Act of 1882, be availed of by them. *Ex parte Valpy & Chaplin* [5], *In re Native Iron Ore Co.* [6], *In re International Pulp & Paper Co. Ltd.* [7], *Smith's Case* [8].

T. Narasimha Aiyangar (with *C. Padmanabha Iyengar*) for Respondents contended that the policy of debentures is to enable the Company to carry on business notwithstanding the existence of the mortgages. A debenture is not a security with a licence to the Company to carry on business. All the cases quoted on the other side are either cases of cessation of business or cases in which the creditor intervened. There is no case in which it has been held that, notwithstanding that business continues and the creditor has not intervened, the security becomes a fixed one *ipso facto* on the happening of certain events.

[*The Chief Justice.*—In (1910) 2 K. B. Buckley L. J. says that there may be a condition of the contract putting an end to the licence to the Company.]

The event may be liquidation or the voluntary winding up of the Co. (1910) 2 K. B. 979 at 986 per Vaughan Williams L. J.

1. (1910) II K. B. 979.
2. (1878) 10 Ch. D. 530.
3. (1904) A. C. 355, 358.
4. (1887) 56 L. J. (Ch.) 536.
5. (1872) 7 Ch. App 289.
6. (1876) 2 Ch. D. 345.
7. (1873) 6 Ch. D. 556 (561).
8. (1879) 11 Ch. D. 581.

[*The Chief Justice.*—There is this to be said in your favour that it is not in the interests of any body that the business of the Company should at once be pulled up on the interest due to the debenture-holders not being paid for 6 months, although all the parties may desire the business to be continued.]

Such a clause as that relied upon for the other side only gives the debenture-holder power to interfere with the business of the Company and, if and so long as he does not do so, the security does not become a fixed one. See. p. 986. There is no suggestion in this case that there was a demand by the debenture-holders on default. On the other hand they allowed the Company to carry on business for a year after default. Reference was made to *Evan's case* [1] *Government Stock Exchange* v *Manilla Railway* [2] Simonson on Debentures and Debentures Stocks, P. 86. *Nelson's case* [3] *Florence Land Co.*: *Exparte Moore* [4].

My answer to the argument based on S. 68 of the Act is this:—This point was raised between the liquidator and the contributories and decided in favour of my clients. The order disposing of that contention was allowed to become final by the debenture-holders and they cannot re-open that question now. S. 169 of the Act ref. All that they can now say is that the charge-holder is not entitled to priority as against them.

[*The Chief Justice.*—Your contention comes to this: a debenture-holder is bound by a decision, to which he was not himself a party, but to which the liquidator and the contributories were parties. Have you any authority in support of that view?]

R. 18 of the Rules framed under the Act.

[*The Chief Justice.*—The general principle is that proceedings in liquidation do not affect secured creditors at all and that they are not bound to come in such proceedings.]

If a debenture-holder wants to question the validity of a charge created while his security was floating, he must do so in liquidation proceedings, and, if he fails to do so and the liquidator contests in such proceedings, the validity of the charge and the point is decided against him, then the matter becomes final even as against the debenture-holder subject, however, to the condition that the debenture-holder may have the order reviewed by applying under S. 169 of the Act. R. 152 of the English Rules—page 179 of Buckley's Book, 20 Ch. D. 137. No creditor, secured

1. (1910) 2 K. B. 989, 1002.
2. (1897) A. C. 81.
3. (1903) II K. B. 867.
4. (1878) 10 Ch. D. 536, 540.

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or unsecured, is entitled to any notice of such proceedings. Moreover the matter arises in execution now and the original order cannot be questioned at this stage. Again, the charge is not invalid under S. 68, because it is in favour of an officer of the Company and is unregistered. If S. 68 stood without the explanation, the charge would have been invalid.

[*The Chief Justice.*—No—that was exactly the point decided by the House of Lords in 12 App. Cas.]

The charge in this case does not come within the explanation, because at the time when my client sought to enforce it, he was not Secretary of the Company. 11 Ch. D. 581 is distinguishable. It is quite possible for a Director of a Company to get a benefit from the Company as a member, such as a gratuity or fees payable to him. The effect of the explanation is that if, in such a case, the charge is not registered, it cannot be enforced. In the present case the charge was in consideration of a loan advanced by the Secretary in his individual capacity and from his private funds. Therefore it is not invalid, 12 App. Cas. 357.

C. Padmanabha Iyengar for 16th Claimant.

S. 68 explanation does not apply to the charge in favour of my client. The Court below has found that he is not an officer of the Company. He was only a paid servant.

S. Srinivasa Iyengar in reply.

Ss. 214 and 216 of the Act show that the Manager of a Company is an officer. Further the articles of association of this Company contemplate the case of a Manager and the 16th claimant admitted in the Court below that he was a manager. Halsbury. Vol. S., p. 242. 5 Ch. App. 289.

S. 68 of the Act ought to be construed in the light of the English law, as it stood at the time when the section was enacted. The Legislature has borrowed the very language of the English decisions, and must therefore have intended to enact the English Law. 11 Ch. D. at 593, per Baggally, L. J.

There can be no case in which an officer of the Company enforces a security as such officer. The applicability of the explanation cannot be limited to such a case. There was no such limitation in the English Law as it stood at the date of the passing of the Indian Act. That was to the effect that an unregistered charge in favour of an officer of the Company, whether in respect of amounts payable to him as such officer or in respect of loans

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advanced by him to the Company, could not be availed of by him.

Further, if the mortgage or charge hit at by the Explanation was only mortgage or charge of a certain class, the explanation must have used words qualifying the words "mortgage or charge." The explanation sought to hit at the mischief of an officer of the Company neglecting to register a mortgage or charge in his favour and the mischief is equally serious whether the security is in respect of monies due to the officer as such or of monies due to him in his private capacity. 11 Ch. D. at 387-8. Ref. to.

Even assuming that the words "as such" mean as such officer, the effect of the Explanation will be that the security cannot be enforced by the officer himself though it can be by a transferee from him.

In India, a debenture-holder is not an English mortgagee, and cannot take possession himself; and, if the protection that I contend for is not given to him, he will be in a very disadvantageous position.

The Court delivered the following

Judgments :—*The Chief Justice*:—These are appeals from an order of the District Judge of Tinnevelly, in O. S. No. 307 of 1911, in the matter of the winding up of the Swadesi Steam Navigation Company, Limited. By an order of the 27th April 1912, made in the winding up the District Judge had held that the charges created by a resolution of the Directors in favour of claimants 23 and 16 the Secretary and Manager of the office of the Company were not rendered invalid by the provisions of the explanation to S. 68 of the Indian Companies Act, 1882, and that they did not amount to a fraudulent preference. The claimants then put in the petitions now under appeal for payment out of the assets of the amounts of their charges when the debenture holders of the Company whose rights as secured creditors had not been considered in the previous application appeared and opposed the applications on the ground that their floating security had become fixed or crystallised and had attached on the assets of the Company before the creation of these charges. The District Judge having overruled these objections the debenture-holders have appealed and have raised three contentions in support of their case.

In the first place, they rely on the express provision of the debenture deed which after charging all the assets of the Company

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by way of floating charge and providing that notwithstanding such charge the Company should have power to carry on business and deal with the assets of the Company until default should have been made for six calendar months in the payment of the principal amount which, admittedly happened, provided that from and after the happening of such default the liberty and authority hereinbefore given (to carry on business) shall forthwith cease and determine and the charge created by this debenture shall and may be immediately enforceable.

In this connection, it must be borne in mind that the right of the Company to create a charge of this kind is incident to its right to carry on business, and it is quite clear that no such charge can be created after the Company had actually stopped business or after the debenture holder had intervened under the powers reserved to him to stop the business by obtaining the appointment of a receiver or petitioning for the winding up of the Company. The difficulty arises when as in the present case the Company has been allowed to go on carrying on business and creating charges, after the happening of any of the events which determined its right to carry on business. In cases of this kind the Courts have been disposed to hold at any rate when the language of the deed admits of it that the right to carry on business is not determined automatically by the happening of one of the events indicated, but continues until the debenture-holder intervenes to show his desire that it should cease as by applying for a receiver. In *Government Stock Investment and other Securities Company* v. *Manila Railway Co.*; [1], Lindley, L. J., pointed out the hardship and injustice that must arise to third parties by the debenture-holders allowing the business to go on after the happening of the specified event and then turning round and treating all the transactions as void under the debenture-deed and held that such a result was so unreasonable and undesirable that in the absence of an express provision to that effect in that case which ought not to be held to have been in contemplation of the parties. On appeal the House of Lords in *Government Stock and other Securities Investment Company* v. *Manila Railway Co.*, [2], took the same view and Lord Macnaughten laid down generally that it was the essence of a floating security that it should remain dormant until the

1. (1895) 2 Ch. 551. 2. (1897) A. C. 81.

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undertaking charged ceases to be a going concern or until the person in whose favour the charge is created intervenes.

There was no difficulty in applying that doctrine to the facts of that case, but there is more difficulty when as in the debenture in *Edward Nelson and Company Ltd.* v. *Faber and Co.*, [1], which is in terms identical with the debenture here except in a particular which does not seem very material. It is expressly provided that on the happening of a specified event the liberty and authority of the Company to carry on business shall forthwith cease and the charge created by the debenture shall and may be immediately enforceable. In this case, it would almost seem as if these words had been expressly inserted to take the case out of the decision in *Government Stock and other Securities Investment Co.* v. *Manilla Floating Company* [2] and to determine the Company's authority to carry on business automatically without any intervention of the debenture-holders. The Courts however lean strongly against such a contention, and Joyce, J., has rejected it in *Nelson & Co.* v. *Faber and Co.* [1], a decision which is not appealed against, has been since cited without comment in some cases and in most text books though it is omitted from the last edition of Buckley on Companies. In a still later case, *Evans* v. *Rival Granite Quarries, Ltd.*, [3]. Fletcher Moulton, L. J., after referring to the leading cases as to the incidents of a floating security of this kind, observed that in all of the cases the Courts realized that it was impossible to come to any other conclusion than that it was intended to leave the Company free to carry on its business until the time arrived when debenture-holders enforced their security upon the Company's assets and undertaking. And the learned Lord Justice went on to say not without reference, I cannot help thinking to *Nelson's case* which had been cited in the argument that though in the earlier cases the actual words of a particular document may have influenced the Courts it early became clear to the Judges that this did not depend on the special language used but upon the essence and nature of a security of this kind. On the other hand, Lord Justice Buckley in the same case, seems still to have relied on the language of the document and speaking of the various ways in which crystallization may happen and the security become fixed, he said "A receiver may be appointed or the

1. (1903) II. K. B. 367. 2. (1897) A. C. 81.
3. (1910) II. K. B. 979.

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Company may go into liquidation and the liquidator be appointed or any event may happen, which is defined as bringing to an end the rights of the Company to carry on business."

In this state of the authorities I hesitate to differ from the decision of Joyce, J., reinforced as it is by the observations of Fletcher Moulton, L. J., although it is not strictly binding on me.

As regards the second point, the appellants do not seem to have relied in the Lower Court on the fact that the Company had stopped business before the granting of the charges and the evidence taken by the District Judge in the earlier case, sufficiently shews that it had not.

The third point is that the charges having been created in favour of officers of the Company one of them is secretary and the other had been appointed by resolution manager of the Company's office and not having been registered as required by S. 68 of the Indian Company's Act of 1882, were not available to the claimants within the meaning of the explanation of that section. This objection was taken by the liquidator in the earlier case and was overruled by the District Judge, now Mr. Justice Oldfield. It was again expressly taken in the Lower Court in this case but was apparently not argued in view of Mr. Oldfield's decision at on earlier stage. It is not expressly mentioned on the grounds of appeal to us, but as the facts are such as to bring the case *prima facie* within the terms of statutory provision, we think that we ought to enforce the provisions of the section if they are applicable.. The Companies' Act of 1862 whilst providing penalties for failure to register mortgages and charges did not provide that unregistered mortgages and charges should be void, but then there were decisions that it could be inequitable to allow officers of the Company to enforce such charges when created in favour of themselves. The late Sir George Jessel criticised these decisions in several cases, pointing out that they imposed an additional penalty not warranted by the statute and his view was finally upheld in 1887 by the House of Lords in *Wright* v. *Horton* [1]. At the time when the Indian Companies Act of 1882 was being drafted and passed into law, the other view still prevailed and the legislature endeavoured to give effect to it as nearly as possible in the words used in the decided cases. In *Exparte Valpy and Chaplain* [2] Lord Justice James after obser-

1. (1887) 12 A. C. 371. 2. (1872) L.R. 7 Ch. App. 289.

Nalla-perumal Pillai v. Krishna Aiyangar.

The Chief Justice.

ving that the mortgage was not void for want of registration went on. "But as it is the duty of the officers of the Company to see that every charge specifically affecting the property of the Company is registered, I am of opinion that no director, manager or other officer of the Company can avail himself of a charge which is not registered" and he applied the doctrine to a person who had acted as solicitor of the Company. The same language was used by the Court of Appeal in *re South Durham Iron Company* [1], where Sir George Jessel interpreted the decisions as meaning that a director, manager or officer cannot avail himself of the security. These are all cases in which the officer had taken a charge in respect of advances made by him to the Company and not for arrears of salary due to him.

The explanation to S. 68 which appears to be intended to reproduce the ruling of Lord Justice James, in *Exparte Valpy & Chaplain* [2], as far as possible in his own language is as follows :— "Omission to register under this section a mortgage or charge does not render it invalid, but the officers of the Company cannot avail themselves as such of a mortgage or charge specifically affecting the property of the Company and not so registered." The words "as such" present some difficulty if they mean as "officers of the Company." It is difficult to see what is meant of the officers of the Company availing themselves of a mortgage or charge unless it be that they cannot take such mortgages or charges when they are officers of the Company which is what was laid down in the cases referred to. It is, I think clear, that the Legislature was anxious to reproduce not only the substance but as far as possible the very language of the decisions and that this must be accepted as the meaning of the explanation.

The only other point is whether both the claimants were officers of the Company. The secretary admitted he was ; the other claimant denies that he was an officer of the Company within the meaning of the section and although he would *prima facie* appear to be such yet, as he appears to rely on special facts which he has not had an opportunity of proving we have decided to call for a finding as to whether he was an officer of the Company within the meaning of the section when he obtained the charges. Fresh evidence may be taken.

1. (1879) 11 Ch. D. 579. 2. (1872) L. R. 7 Ch. 289.

Nalla-perumal Pillai v. Krishna Aiyangar.

The finding should be submitted in one month after the re-opening of the Lower Court after the midsummer vacation. Seven days will be allowed for filing objections.

The appeals against orders No. 24 and 29 to 31 of 1914, are allowed as against the 23rd claimant with costs.

Tyabji, J.:—I agree.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Oldfield and Mr. Justice Napier.

Venugopalachariar ... *Appellant* (2nd Defendant).*

v.

Padmanabha Row ... *Respondent (Plaintiff).*

Venugopala-chariar v. Padmanabha Row.

Civil Procedure Code, 1908—O. 34, Rr. 4 (1), 5 and 6—Appendix D, Forms 4 and 12—Mortgage—Suit for sale—Preliminary decree—Costs—Declaration of personal liability of purchaser of mortgaged property subsequent to mortgage—Validity.

Where the preliminary decree in a suit for sale upon a mortgage contained a declaration of the personal liability of the 2nd defendant (the purchaser of the mortgaged property after the suit mortgage) for plaintiff's costs in case the sale proceeds were not sufficient to pay them as well as the mortgage-money.

Held, that, though such a declaration might be given against the mortgagor, it could not be given against any other party and that the same must therefore be expunged from the decree.

Second appeal from the decree of the Court of the Sub-Judge of Tinnevelly in Appeal No. 424 of 1912, preferred against the decree of the Court of the Additional Dt. Munsif of Tinnevelly in O. S. No. 64 of 1912.

K. Jagannatha Iyer for appellant.

S. Ramaswami Iyer for respondent.

The Court delivered the following

Judgment:—The suit was on a mortgage and ended in a decree for recovery by sale of the property. The decree also contained a declaration of the personal liability of 2nd defendant for plaintiff's costs in case the sale proceeds were not sufficient to pay them as well as the mortgage-money. 2nd defendant who appeals against this part of the decree purchased the property after the suit mortgage.

His first objection, that such a declaration can in no case be included in a preliminary decree for sale, is answered by reference to *Kamalamma* v. *Komandur Narasimhacharlu* 1.

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*S. A. No. 2594 of 1913. 9th April 1915.

1. (1907) I. L. R. 30 M. 464 : s.c. 17 M.L.J. 317.

Venugopalachariar v. Padmanabha Row.

Next he argues that, whilst such a declaration can be given, as in that case, against the mortgagor, none can be given against any other party, because it is only against the mortgagor that a personal decree under O. 34, R. 6, (S. 90 Transfer of Property Act) can eventually be passed. Costs, it is said, may be legally recoverable from 2nd defendant under the decree against him. But the mortgage money will not be legally recoverable from him; and, as the assumption that the portion of the decree amount unsatisfied by the sale proceeds represents costs, not the mortgage money, will be inadmissible, the passing of a personal decree against him for it will not be justified by law.

We have been referred to English cases, in which this relief was given, *Sharples* v. *Adams* [1], *Liverpool Marine Credit Co.* v. *Wilson* [2], and *Griffith* v. *Pound* [3]. But in the first the defendant was in the position of the mortgagor, since he made the mortgage as his trustee and with his sanction; and in any case in the absence of statutory restrictions on the contents of the decree, English practice is conclusive. Such statutory restrictions are imposed in India by O. 34, R. 4 (1) and 5 and the forms of decree nos. 4 and 11 Appendix D of the Civil Procedure Code, the heading of the last mentioned form "Decree against mortgagor personally," implying what (it will be seen) authority supports, that "defendant" in Rule 6 means only the mortgagor. We have not been shown authority for disregarding these restrictions and do not feel entitled to do so.

The decisions in *Ram Lal* v. *Sil Chand* [4], and *Mota Amber* v. *Sri Dhar* [5], are that "defendant" in S. 90, Transfer of Property Act, means only the mortgagor and that no subsequent decree can be made against any other defendant, when the preliminary decree has provided for recovery of costs only by sale of the property. The judgments no doubt support plaintiff by the suggestions contained in them, that personal decrees for costs could have been made against such other defendants if they had been applied for when the preliminary decrees were passed. For, if such decrees could have been given with immediate effect, it is hard to understand why they should not be given like that before us, as declarations subject to the result of the sale. But these

1. (1863) 32 Beaven 213 : 55 E.R. 84. 2. (1872) L. R. 7 Ch. App. 507.
3. (1890) 45 Ch. D. 553. 4. (1901) I.L.R. 23 A. 439.
5. (1904) I.L.R. 26 A. 507.

Venugopalachariar v. Padmanabha Row.

suggestions were only *obiter*, and the distinction between liability for costs and mortgage money, on which plaintiff relies here, was not referred to That distinction was drawn, though as between mortgagee and mortgagor, in *Damodar Das* v. *Budh Kuar* [1], and *Rutneswar* v. *Jusoda* [2]. But the decrees in those cases were for foreclosure; and the Court disregarded the distinction in two cases, in which the decrees were (as here) for sale. *Raj Kumar Singh* v. *Sheo Narayan Sahu* [3], and *Jagannath* v. *Junia* [4]. In the later case the distinction was material between the parties to the mortgage with reference to limitation; and Chamier J., whose conclusions we respectfully adopt, refused to draw it, holding that no such disintegration of the amount declared due under O. XXXIV, Rule 4 was contemplated by the legislature, and, that no presumption in favour of the appropriation of sale proceeds in any particular way was recognised by authority. It has not been shown how those principles, valid between mortgagor and mortgagee, are invalid between the former and other defendants

Taking this view, we must decide for 2nd defendant though the result of doing so will be to exempt him from liability for the expense which his deceitful and reckless pleading has imposed on plaintiff. The Second Appeal is allowed and the declaration regarding 2nd defendant's liability is expunged from the decree under appeal. In view of his conduct he will pay his own costs before the District Munsiff. Plaintiff must pay his costs in first and second appeals.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Mr. Justice Sadasiva Aiyar and Mr. Justice Napier.

Janga Venkatareddy and others ... *Appellants* *(*Defendants*)

v.

Jamal Ahmed Saheb ... *Respondent* (*plaintiff*).

Janga Venkata-Reddy v. Jamal Ahmed Saheb.

Vendor and purchaser—Deficiency in extent sold—Suit for compensation—Maintainability—Execution of conveyance—Effect—Covenant for title—Nature and scope of.

A covenant for title is not a covenant that the land purported to be conveyed is of the extent stated in the sale deed but is a contract with the buyer that the interest which the seller professes to transfer to the buyer subsists and that he has power to transfer the same

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*S. A. No. 986 of 1914 — 12th April 1915.

1 (1888) I.L.R. 10 A. 179. 2. (1886) I.L.R. 14 C. 185.

3. (1909) I.L.R. 35 C. 431. 4. (1914) 12 A.L.J. 645

Janga Venkata Reddy v. Jamal Ahmed Saheb.

A suit by the purchaser of land for the recovery of compensation in respect of a deficiency in extent cannot therefore be based on the covenant for title but must be as for part failure of consideration. Such a claim can be made even after the execution of the conveyance.

In re *Turner and Skelton* 1 followed.

Joliffe v. *Baker* 2 not followed.

Second Appeal from the decree of the Court of the Temporary Subordinate Judge of Masulipatam in A. S. No. 130 of 1913, preferred against the decree of the Court of the District Munsif of Ellore in O. S. No. 1846 of 1911.

The defendants in the suit were the appellants in Second Appeal. The suit was for the rectification of a sale-deed executed by the defendants in favour of the plaintiff by inserting No. 475/C instead of No. 475/A in it, and for the recovery of compensation for the deficiency in the extent of the lands sold. No. 475/C was only 82 cents in extent while No. 475/A was 1-14 cents and the compensation claimed by the plaintiff was in respect of the difference in the extent between the two Survey numbers. The plaint alleged that the defendants intended to sell and did sell only, land bearing No. 475 which did not belong to them, that they were guilty of fraud in doing so, and that the plaintiff was therefore entitled to compensation for the deficiency in the extent of the lands sold. The District Munsif found that only 475/C was intended to be sold to the plaintiff and that 475/A was inserted in the sale-deed by mistake but that the defendants were not guilty of fraud in respect of the mistake. He directed the rectification prayed for, but dismissed the suit in so far as the prayer for compensation was concerned on the grounds that both parties were agreed as to the identity of the land sold, *viz.*, 475/C, but that they were under a mistake as to its extent and that there was no fraud on the part of the defendants. He was of opinion that in the absence of fraud on the part of the defendants and any guarantee on their part that the land sold was of a particular area, they were not liable for compensation for the deficiency. On appeal, the Subordinate Judge accepted the finding that No. 475/A was inserted for 475/C by mistake on the part of both the parties. He nevertheless gave the plaintiff compensation on the grounds that the sale price was fixed according to acreage and that fraud was not required to entitle a purchaser to compensation for deficiency in the extent of the land sold. He

1. (1880) 13 Ch. D. 131. 2. (1883) 11 Q. B. D. 255.

Jana Venkata Reddy v. Jamal Ahmed Saheb.

Napier J.

accordingly modified the decree of the Court below. Against his decree the above Second Appeal was preferred on the grounds that fraud was necessary to entitle a purchaser to compensation and that the sale was not according to acreage but with reference to Survey number.

R. Narasimham for Appellants.

T. Ramachandra Rao for Respondent.

The Court delivered the following

Judgment:—*Napier, J.* This is an appeal from a judgment of the Temporary Subordinate Judge of Masulipatam allowing a claim for compensation by the purchaser of certain land in respect of a deficiency in extent. The District Munsif disallowed the claim on the authority of the case reported in *Abdullah Khan* v. *Abdur Rahaman Beg* [1]. The Subordinate Judge relying on the case reported in *Doyal Krishna Naskar* v. *Amrita Lal Dass* [2] where *Abdullah* v. *Abdur Rahaman Beg*[1] was dissented from allowed the claim. The basis on which the claim is made is not stated in the plaint, but it was sought in argument to base it on the implied covenant for title relying on the case reported in *Nageswara Rao* v. *Sambasiva Row*[3]. In my opinion that case does not apply. A covenant for title is not a covenant that the land purported to be conveyed is to the extent stated in the sale-deed, but as shortly defined in S. 55 of the Transfer of Property Act a contract with the buyer that the interest which the seller professes to transfer to the buyer subsists and that he has power to transfer the same. Further this suit is well-known in English law and has never been based on a covenant for title. In my opinion the suit is brought for part failure of consideration owing to a mutual mistake. Admittedly where a contract has been made and one of the parties is unable to perform the whole of his part of it, but the part which must be left unperformed bears only a small proportion to the whole in value, a suit lies at the instance of the other party under S. 14 of the Specific Relief Act, Act I of 1877, for direction by the Court for specific performance of so much of the contract as can be performed with compensation in money for the deficiency. If therefore the parties have discovered their mistakes as to the area prior to the conveyance the vendee could have brought a suit asking for compensation ; and

1. (1896) I.L.R. 18 A. 322. 2. (1902) I. L. R. 29 C. 370.
3. (1911) M. W. N. 361.

seeing that the Specific Relief Act is intended to give reliefs of a certain class where an injury has been suffered, it seems necessarily to follow that a legal injury is presumed by this Act to exist for which the Act provides a remedy at one stage. I am therefore clear that there is a cause of action arising out of a legal injury. This is the view taken by the Courts of Equity in England. *Vide* the leading case of *Hill* v. *Buckley* [1] and Dart's law of Vendors and Purchasers, 7th Edition, page 675.

The only question that remains is whether this claim cannot be made after the execution of the conveyance. That point is expressly decided by Jessel, M. R., *in re Turner and Skelton* [2]. The learned Master of the Rolls says as follows:—No book can be produced to show that it was thought to be settled law that a purchaser loses his right to compensation by taking a conveyance and on what principle should he do so? "The purchaser can only investigate the state of the property before completion by permission of the vendor, which permission the vendor is not bound to give. When the mistake is one which a purchaser could not by due deligence discover, why should he be held not to be entitled to compensation?" The learned Master of the Rolls followed an earlier decision in *Cann* v. *Cann* [3] and decided in favour of the vendee. It is true that a different view was taken in *Joliffe* v. *Baker* [4], but I am prepared to follow the decision of this high authority, as I find nothing in any statute which makes the principle inapplicable.

The appeal will therefore be dismissed with costs.

Sadasiva Aiyar, J.:—I entirely agree and I have nothing to add.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Seshagiri Aiyar and Mr. Justice Kumaraswami Sastri.

Ramiah Bhagavatar and others ... *(Appellants* Plaintiffs)*

v.

Somasi Ambalam and another ... *Respondents (Defendants.)*

Contract Act, Ss. 62 and 63—Specific Relief Act, S. 26 (e)—Contract—Novation—Specific performance—Substitution of new contract after breach of original contract—Original contract if can be specifically enforced.

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* S. A. 2554 of 1913. 16th April 1915.

1. (1811) 17 Vesey Junior 395, 34 E.R. 153.
2. (1880) 13 Ch. D. 136.
3. (1830) 3 Simon 447, s.c. 57 E.R. 1065.
4. (1883) 11 Q. B. D. 255.

Ramiah Bhagavatar v. Somasi Ambalam.

Seshagiri Aiyar, J.

Per Kumaraswami Sastri, J. (*Seshagiri Aiyar, J. contra*). There is nothing either in S. 62 of the Contract Act or in S. 26 (e) of the Specific Relief Act to restrict the operation of those sections to variations of a contract prior to its breach. Where there has been a variation of a contract subsequent to its breach, there can be no decree for specific performance of the contract except with the variation.

Manohar Koyal v. *Thakur Das Naskar* [1] dissented from.

The rules of English Law as to variation of a contract after its breach, have not been adopted by the Indian Legislature in framing S 63 of the Contract Act.

Per Seshagiri Iyer, J.—S. 62 of the Contract Act contemplates that the original contract subsists and that the parties have agreed to replace it by a new contract, while S. 63 deals with cases where there has been a breach of the contract.

The English authorities which recognise the distinction between promises made before breach and those after breach must have been present to the minds of the framers of the Contract Act.

Quaere: Whether S. 56 (e) of the Specific Relief Act would not apply to a case which does not come within S. 62 of the Contract Act.

Second appeal from the judgment and decree, dated 14th day of July 1913, of the District Court of Madura, in Appeal Suit No. 54 of 1912, preferred against the decree of the Court of the Principal Dt. Munsif of Madura, in O. S. No. 359 of 1910.

The facts of the case sufficiently appear from the judgments of the Court.

M. D. Devadoss for appellants.

T. V. Muthukrishna Aiyar for respondents.

The Court delivered the following

Judgments:—*Seshagiri Aiyar, J.*:—My learned brother has stated the facts. It is only necessary to refer to the exact finding arrived at by the District Judge. He finds that the settlement come to at the time of withdrawing the first suit was to substitute a different piece of land for the one which was originally agreed to be conveyed. The consideration was to be the same: and there was to be no change in the parties to the contract.

Mr. Devadoss contends that S. 62 of the Contract Act does not apply to such a case. On the finding as stated by me, there has been no breach of the contract, but only a variation, with the consent of the parties, in one of the essential terms. The suit which complained of default in the performance ended in this adjustment. There is no finding that the contract was really broken. If Mr. Devadoss's premises are correct, namely, that there was a breach of the first contract. I would have agreed with him that S. 62 will not help the defendant. The case *Manohur Koyal* v. *Thakur Das Naskur* [1] will then be directly in point. Mr. Muthukrishna Aiyar has not convinced me that this decision is

1. (1887) I. L. R. 15 C. 319.

Ramiah Bhagavatar v. Somasi Ambalam. Seshagiri Aiyar, J.

wrong. S. 62 contemplates that the original contract subsists and that the parties have agreed to replace it by a new contract. The language suggests that the contract of both the parties subsists when the substitution, rescision or alteration takes place. S. 63, on the other hand deals with cases where there has been a breach of the contract. No doubt as pointed out by Mr. Justice Subramania Aiyar in the case of *Davis* v. *Kandasami Mudali* [1], this section refers to unilateral acts, whereas under S. 62 the concurrence of both the parties is required. That is not the only distinction between the two sections. It is pointed out that both the sections find place under the heading "contracts which need not be performed." I do dot think this can afford any assistance in the construction of the sections. The English authorities which recognise the distinction between promises made before breach and those after breach must have been present to the minds of the framers of the Contract Act. As at present advised, I am not prepared to dissent from the view taken in the case *Manohur Koyal* v. *Thakur Das Naskur* [2]. But it is not necessary to discuss this subject any further.

I think the judgment of the District Judge can be supported on another ground. To the claim for specific performance made by the plaintiff, defendants' reply is that there has been a subsequent agreement to vary one of the terms of the contract by substituting another piece of land for the one already agreed upon. This defence is covered by S. 26 (*e*) of the Specific Relief Act. That clause does not permit of a plea which sets up the abandonment of the first contract. It can be availed of only in cases of variation and, as I said before, the pleadings and the finding of the Dt. Judge show that this is a contract of that description. I am unable to agree with the contention of the learned counsel for the appellant that S. 26 (*e*) will not apply, if one of the parties to the contract has been complained against for default. There is no warrant for such contention. It is open to argument that even if there has been a breach, S. 26 (*e*) of the Specific Relief Act would apply, although S. 62 of the Contract Act may not.

The decree of the District Judge is right and this second appeal is dismissed with costs.

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1. (1896) I. L. R. 19 M. 398; 6 M.L.J. 202. 2. (1887) I. L. R. 15 C. 319.

Ramiah Bhagavatar v. Somasi Ambalam.

Kumaraswami Sastri, J.

Kumaraswami Sastri, J. :—The plaintiffs who are the appellants sue for specific performance of a contract by the defendants to sell the land described in the plaint and for damages. The plea of the defendants was that by an agreement between the parties certain other land was substituted for the land they originally agreed to sell and both the lower Courts found that the plea was proved and dismissed the plaintiff's suit on the ground that the plaintiffs were not entitled to a conveyance of the land claimed

It is argued for the appellants that, inasmuch as the variation set up was after the breach of the contract, the plaintiffs are entitled to sue on the original contract without any reference to the variation agreed to by them and reliance has been placed on *Manohur Koyal* v. *Thakur Das Naskur* [1]. There can be little doubt from the evidence that, after the plaintiffs filed a suit to recover the advance paid and damages alleging breach of contract by defendants there was a mediation as a result of which it was agreed between the plaintiffs and the defendants that land bearing Survey No. 153 *(b)* was to be sold instead of the land originally agreed upon. This appeal was argued on both sides on the footing that the variation was after the breach of contract.

I am of opinion that the present case falls within S. 26, cl. (*e*), of the Specific Relief Act and that the plaintiffs are not entitled to enforce the contract sued upon without the variation set up by the defendants. The section is clear and enacts that where a plaintiff seeks to enforce specific performance of a contract in writing to which the defendant sets up a variation, the plaintiff cannot obtain the performance sought except with the variation so set up, where the parties have, subsequently to the execution of the contract, contracted to vary it. I see nothing in the section or illustrations to limit its operation to variations prior to the breach of the contract. It is no doubt true that under the English Common Law there should be some independent benefit actual or contingent, which is the consideration for varying a contract not under seal and that after breach the only plea that would be a valid defence would be in accord and satisfaction where a party seeks to set up a variation of the terms of the contract. With all deference to the learned Judges who decided

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1. (1887) I. L. R. 15 C. 319.

Ramiah Bhagavatar *v.* Somasi Ambalam.

Kumaraswami Sastri, J.

Manohur Koyal v. *Thakur Das Naskur* [1] I am unable to see any grounds for introducing the same rule in construing either S. 26, cl. (e) of the Specific Relief Act or Ss. 62 and 63 of the Contract Act, which are general in their terms. The observation of the learned Editors of the Smith's Leading cases on *Cumber* v. *Wane* [2], and the view of Lord Blackburn in *Foulkes* v. *Bear* [3], show that the rules of English Law as to consideration for variation are not founded on any sound principle. The legislature has not adopted the principles laid down in *Foulkes* v. *Bear* [3], when it enacted S. 63 of the Contract Act, and so far as the Madras High Court is concerned, it has been held that no consideration is necessary for a contract to extend the time for performance of a contract (*Davis* v. *Cundasami Mudali* [4]). There seems to me to be no reason why after breach, the parties should not agree to vary the terms or why a plaintiff who consents to such variation should not be held bound by the terms of his agreement. As a matter of practice it is very common in this country for mediators to interfere after quarrels have arisen between the parties and effect a compromise between them and I see nothing inequitable in holding the parties to the variation agreed to irrespective of whether the variation was before or after breach. I do not think that Courts should engraft on the plain meaning of the provisions of Indian enactments, limitations founded on technical rules of English Law and pleading especially in cases where such limitations are not suited to the conditions prevailing in this country. The observations of Sir Frederick Pollock (in his Genesis of the Common Law, page 92) as to the undesirability of the blind following of English precedents which have been referred to with approval by Justice Mukerjee in *Munghoori Bibi* v. *Akel Mahmud* [5], may well be borne in mind in considering this question.

I am of opinion that the decrees of the Courts below are right and dismiss the second appeal with costs.

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1. (1887) I. L. R. 15 C. 319.
2. Strange's reports, page 426, and at page 349 of Vol. I, Smith's Leading Cases.
3. (1884) 9 A. C. 622.
4. (1896) I. L. R. 19 M 398, s.c. 6 M.L.J. 202.
5. (1914) I. L. R. 41 C. 1125.

PRIVY COUNCIL.

[On appeal from the High Court at Calcutta].

Present :—Lords Dunedin and Lord Atkinson, Sir George Farwell and Sir John Edge.

Thakur Vasonji Morarji ... *Appellant**

v.

Musammat Chanda Bibi ... *Respondent.*

P. C.

Thakur Vasonji Morarji *v.* Musammat. Chanda Bibi

Hindu Law—Mitakshara School—Widow's estate—Alienation—Reversioner—Right. title and interest of the widow conveyed—Effect of—Recital of necessity—Deed—Construction—Absolute estate conveyed.

Where a Hindu widow alienated property belonging to her husband's estate for binding purposes of necessity but she purported to convey only her own "right, title and interest" in the property though the recitals of necessity and the statement that thereafter the transferee should enjoy the property as full owner showed that what was intended to be conveyed by those terms was the absolute interest and not merely the widow's estate.

Held, that those words were consistent with the passing of the larger interest and the purchaser took an absolute estate.

Hunooman Pershad Panday v. *Musammat Munraj Koonwar* [1] approved.

Appeal heard *ex parte* from a judgment and decree of the High Court of Allahabad dated Feb. 6, 1912 reversing a judgment and decree of the Subordinate Judge of Benares, dated July 20, 1910.

Ras Bihari Lal.

Radhe Gobind—Phundo Bibi (died childless) (widow)

Krishen Chaitan Deo

Kunj Bihari Lal—Rama Bibi (widow)

Chanda Bibi (daughter) (*Plff.*)

The property in question was acquired by Ras Bihari. After his death Radha Gobind and Krishna Chaitan remained in possession. The former having died, leaving a widow in Phundo Bibi, Krishna Chaitan came into exclusive possession of the property. He also having died, his son Kunj Bihari came into possession on whose death his widow, Rama Bibi obtained possession as widow. The appellants wishing to build a dharamsala at Benares purchased the houses in question from Rama Bibi and as Phundo Bibi had a right to maintenance, she was also joined as vendor. Out of the

7th May 1915.

1 (1856) 6 M I.A. 393, 411—12.

P. C.

Thakur Vasonji Morarji v. Musammat Chanda Bibi.

Lord Atkinson.

purchase money some existing ancestral debts, were paid and so were some of the debts contracted for necessity. On the death of the widow Chanda Bibi, daughter of Kunj Bihari Lal sought to set aside the deed of conveyance on the ground that the widow alienated her life estate only and that her consent was not obtained and could not be obtained as she was a minor at the date of sale. The Subordinate Judge decided against her, holding that alienation by the widow was for necessity and that it was effected with full knowledge and consent of Chanda Bibi. The High Court on appeal decided that it was not clear from the recital of the deed that the widow intended to convey more than her life estate and allowed the appeal. The appellant then appealed to His Majesty in Council in due course.

De Gruyther, K. C., with him *Lowndes* for the appellant contended that on reading the deed of conveyance as a whole and having regard to the circumstances it was evident that all parties intended that the whole estate should pass under the conveyance. The deed must be construed very liberally and the real intention of the parties must be given effect to. See *Hanuman Pershad Panday* v. *Musammat Babooe Munraj Kunwaree* [1]. The appellant was buying the house for erecting a dharamsala and paid adequate consideration. The widow had some debts both ancestral and of her own, which was satisfied out of the purchase money. She being owner had power to sell absolutely under such circumstances. The respondent gave her consent by allowing her husband to sign the deed and as a matter of fact he lived in the house purchased with part of the amount. The appellant before purchasing the property used reasonable case to ascertain that there was legal necessity and acted in good faith. The appellant was therefore protected by S. 38 of the Transfer of Property Act. In any case respondent was not entitled to the house now standing and should pay for the same before obtaining possession of the same.

Respondent did not appear.

The judgment of their Lordships was delivered by

Lord Atkinson.—This is an appeal from a decree of the High Court of the North-Western Provinces, Allahabad, dated the 6th February 1912, whereby a decree of the Subordinate Judge of

1. (1856) 6 M. I. A. 393, 411.

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Benares, dated the 23th of July 1910 was set aside. The respondent did not appear on the hearing before this Board to support the judgment appealed from.

The suit out of which the appeal has arisen was brought by the respondent against Thakur Vasonji Morarji, a well-to-do merchant of Bombay to recover possession of a certain house in the city of Benares, and also mesne rates.

The land upon which this house is built was part of the immovable property inherited by the respondent's father, one Kunj Behari Lal, the last surviving male member of a joint Hindu family, who died on the 6th of November 1890. He left his widow, Mussammat Rama Bibi, and the respondent, his daughter, by that lady him surviving. He had no other issue. One Musammat Phundo Bibi, the widow of Goshain Radke Gobind, the paternal uncle of Kunj Behari Lal, was, in and subsequent to the year 1892, entitled to maintenance out of the property so inherited by the latter. By deed, dated the 24th of November 1892, these two widowed ladies jointly conveyed to Thakur Vasonji Morarji some interest in the site of the aforesaid house with the two houses then standing upon it in consideration of the sum of Rs. 10,500.

The main question in dispute upon which the two Indian tribunals have differed is the nature of the interest so conveyed. The Subordinate Judge held in effect as a fact, first, that the sale of these houses was made by Musammat Rama Bibi as a matter of necessity, in order to discharge out of the purchase money certain debts due respectively by her husband's father, Krishen Chaitan Deo, deceased, and his aforesaid paternal uncle amounting to Rs. 9,500, with interest, for the payment of which the creditors were pressing, and also certain debts incurred by herself, in order to obtain the necessaries of life for the family; and, secondly, that Musammat Rama Bibi, having under these circumstances the power to sell the absolute interest in this immoveable property, she intended so to do: that this deed, on the true construction of its terms, effected her intention, and carried to and vested in the purchaser the absolute interest in the then existing two houses and their sites.

The High Court, while not differing from, or disturbing in any way the conclusions of fact at which the Subordinate Judge had arrived, or questioning the intention of Musammat Rama Bibi, to sell and convey the absolute interest in this piece of

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immoveable property, held that the terms of the deed were inadequate to convey to the purchaser anything beyond her own interest in the same, which they described as a life interest.

The purchaser, the defendant in the suit, died on the 22nd of March 1913. He purchased these houses for the purpose of founding a Dharamshalla on their site, and with that object caused the two dilapidated houses standing upon it at the date of the deed to be demolished, and one house to be erected upon the site at a cost to him of Rs. 13,000. Rama Bibi died on the 19th of August 1909, Phundo Bibi having pre-deceased her. On the 12th of January 1910, this suit was instituted by the respondent, as heir of her father, claiming the relief asked for on the ground that the sale by her deceased mother was made without necessity and without her, the respondent's consent. The Subordinate Judge found as a question of fact that the respondent was not a minor at the date of the deed, and that she had full knowledge of the intended sale, and consented to it. Owing to the fact that the respondent did not appear on the hearing of this appeal, their Lordships thought it right not to content themselves with accepting and acting on the findings of fact of the Subordinate Judge, without examining for themselves the evidence upon which those findings purport to be based. Counsel for the appellant has accordingly fully opened this evidence. Their Lordships have fully considered it, and are clearly of opinion that the existence of the debts incurred by the predecessors of Kunj Behari Lal to the amount mentioned, the necessity for the sale of the absolute interest in these two houses in order to discharge them, and the payment of them out of the purchase money when obtained, are clearly established. Their Lordships see no reason whatever to dissent from any of the Subordinate Judge's findings of fact.

The question of the proper construction of the deed of conveyance remains. The principle laid down by Lord Justice Knight Bruce in delivering the judgment of this Board in the case of *Hunoonman Pershad Pandy* v. *Mussammat Babooe Munraj Koonwaree* [1] is particularly applicable to this case. At p. 411—412 of the report he says :—

"Deeds and contracts of the people of India ought to be liberally construed. "The form of expression, literal sense, is not to be so much regarded as the real "meaning of the parties which the transaction discloses."

1. (1856) 6 M. I. A. 393.

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Well, it appears to their Lordships that an examination in detail of the provisions of the deed of conveyance in this case cannot leave any doubt upon one's mind that all the parties meant that the absolute interest in these two houses be conveyed to the purchaser, and thought that it had by the deed been effectually conveyed to him. That instrument commences with a full and detailed recital of the title to the property. It contains a declaration that Rama Bibi is the owner of all the property left by her deceased husband, but that Phundo Bibi being an elderly woman in the family, this property was by courtesy enjoyed by the latter jointly with herself.

It is then recited that the deceased husbands of these two ladies (both of whom execute the deed) did not leave behind them property, the produce of which was sufficient to meet their necessary expenses; that they had been obliged to borrow money to provide the ordinary necessaries of life; that the father and paternal uncle of Kunj Behari Lal were at the time of their respective deaths each indebted to several creditors, still unpaid, who were pressing for their money; and that the only way by which money could be procured to discharge all these debts was by selling a portion of the property inherited by Kunj Behari Lall. Not, be it observed, a particular estate, or interest in the whole or a portion of that property but a portion of the property itself, part of the *corpus* as it were, if one may use that expression.

Now, it is plain that all those recitals touching the existing indebtedness of the executants and their predecessors could only have been introduced for the purpose of showing that the circumstances were such as to give to the executants the power to dispose of the absolute interest. The recitals were entirely otiose, serving no purpose whatever, if the intention and object of the parties were merely to dispose of the interest to which Rama Bibi would normally be entitled as the widow of her deceased husband. She could dispose of that interest whether debts existed or not. So that special pains are taken to set out in detail the facts and circumstances which remove every fetter from her power of disposition over the absolute interest.

It is next recited that the two executants have jointly and severally agreed to sell and convey all their full and existing rights in the two houses to the purchaser for the sum of Rs. 10, 500 to be paid in cash; and that Phundo Bibi has joined as an

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executant, by virtue of her position in the family for the additional guarantee of the vendee. Her right to maintenance was a liability affecting the absolute interest in every portion of the property left by Kunj Behari Lal. It might last beyond the life of Rama Bibi if Phundo Bibi outlived her ; but the vendee, it was agreed, was to enjoy the property absolutely discharged from this latter liability for all time. By the operative granting part of the deed Rama Bibi in the first place sells, conveys, and transfers all her rights and interest in these two houses to the purchaser without any reservation. Then Phundo Bibi transfers to him her only right in the property, namely, her right to maintenance. And then the two ladies jointly proceed to sell and convey to him all their own existing right, title, and interest in, or belonging or appertaining to these two houses, including easements, and declare that from the execution of the deed thenceforth the purchaser shall be—

"the full owner and proprietor of the said houses in our stead, and shall own, "possess, and enjoy them in the same way as we have been hitherto doing".

Then there follow two very significant provisions, first, that—

"as proof of the existing debts and the necessity of conveying the property for "purposes aforesaid Sham Lal, the husband of Chanda Bibi" (*the respondent*) "has signed as one of the witnesses of the deed,"

and secondly, that—

"should at any time the said vendee or his heirs and representatives be deprived "of the whole or part of the property conveyed by this deed he or they would be "entitled to recover the money in full or in part, as the case may be, from us "and rest of our property."

That guarantee might not be of much value, but it contemplated a loss which might occur after the death of Rama Bibi. Well, the purchase money was paid, the debts were discharged, and Sham Lal and the creditors of the male debtors, whose claims were paid, signed the deed as witnesses.

Thus every precaution which apparently occurred to the minds of the parties to the instrument or to those of their advisers was taken to show on the face of the document that circumstances existed which would empower Rama Bibi to dispose of the absolute interest in this property.

There can be no doubt, therefore, as to the object and intention of the parties to the transaction, and as to their view as to the meaning and effect of the language of the instrument. They all obviously intended that all the interest which the recited

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circumstances, true in themselves, empowered Rama Bibi to alienate should pass to the vendee, and it is equally plain that they thought that the effect of the instrument was to pass it to him.

The High Court seem to have attached little importance to some, if indeed not all, of the pregnant recitals which have been referred to. They took the two following passages from the granting part of the deed, first:—

"I, the said Rama Bibi, do hereby convey, sell, and transfer all my rights and "interest in the said houses which, I inherited from my said deceased husband, "Goshain Kunj Behari Lal."

And secondly—

"We . . . sell all our existing rights, title, and interests . . ."

As together with the declaration that the vendee—

"will be the full owner and proprietor of the said houses in our stead, and shall "own, possess, and enjoy them in the same way as we have been hitherto doing."

They then proceed to say—

"These recitals" (as they erroneously style them) show that the widow was "selling such rights as she had as widow, that is to say, her life estate."

With all respect to the learned judges of the High Court, their Lordships are quite unable to take that view. They think that the High Court fell into the very error which Lord Justice Knight Bruce, in the passage already quoted, stated should be guarded against in the construction of deeds between the people of India. They took the strict literal sense of the words in the passages referred to, and ignored the meaning which the parties to the transaction obviously attached to them. It is not quite accurate to describe the interest which a widow normally takes in immovable property, which her husband inherits and leaves at his death, as a "life estate."

In Ch. 2 of Mr. Mayne's "Hindu Law," 8th Ed. p. 846, he lays it down that it is wholly incorrect so to describe her estate, and that it would be just as untrue to speak of the estate of a father under the Mitakshara law as one for life.

"Hindu law," he says, "knows nothing of estates for life or in tail or in fee. "It measures estates not by duration but by use The restrictions upon the use "of an estate inherited by a woman are similar in kind to those which limit the "powers of a male holder but different in degree. The distinctive feature of the "estate is that at her death it reverts to the heirs of the last male owner."

And again at page 870:—

"It is not a life estate, because, under certain circumstances, she can give an "absolute and complete title. Nor is it in any sense an estate held in trust for "the reversioners. Within the limits imposed upon her, the female holder has the "most absolute powers of enjoyment."

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If the circumstances existed which enabled her to dispose of that absolute interest, and she intended to dispose of it, the language of the instrument does not seem inadequate for the purpose.

Taking the deed as a whole and endeavouring to reconcile its various provisions the one with the other, giving effect as far as possible to each, their Lordships find nothing in its language constraining them to adopt a construction which would plainly defeat the object and intention of the contracting parties. They think the passages relied upon by the High Court may well be construed as meaning to refer to the right to, and interest in, the property which Rama Bibi, as the widow of her deceased husband, had, in the particular circumstances of the case, power, for the purpose indicated, to sell and dispose of, that is, the absolute interest, and not as merely meaning to refer to the right and interest which a widow normally takes in the immoveable property which her husband owned at his death and leaves after him.

Their Lordships are, therefore, of opinion that the decree appealed from was erroneous and should be reversed, that the decree of the Subordinate Judge should be restored with costs throughout, and they will humbly advise His Majesty accordingly.

The respondent will pay the costs of this appeal.

Solicitors for appellant: *T. L. Wilson and Co.*

PRIVY COUNCIL.

Present :—Viscount Haldane, Lord Shaw, Sir George Farwell, Sir John Edge and Mr. Ameer Ali.

[On Appeal from the Chief Court at Punjab.]

Bagga and others ... *Appellants**

v.

Saleh and others .. *Respondents.*

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Bagga v. Saleh.

Punjab—Land tenure—Custom—Proprietors of houses — Paying Tirni — Not owning land assessed to land revenue—Claims to share in village common land.

Where the plaintiffs who owned house sites and were paying tirni or grazing dues but did not own any land assessed to land revenue claimed that they were entitled to share in the common lands of the village like proprietors owning lands assessed to land revenue.

Held, that they were not so entitled.

Appeal heard *ex parte* from a judgment and decree of the Chief Court dated June 20, 1907 reversing a judgment and decree

* 24th June 1915.

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of the Collector and Colonising Officer, Jhelum Canal Colony, Sargodha, exercising the powers of a Civil Judge, dated June 30, 1905.

The Village Lak arose out of the foundation of various scattered hamlets in the jungle by men mainly of the Lak tribe. The settlers by the time of the Regular Settlement in 1863 formed themselves into *tarafs* or sub-divisions. The Lak *taraf* was mainly held by Laks and the inhabitants of Mari Lak and Ajnala hamlets. Under the Sikh Government the system of collection of revenue was for a quarter share of the grain produce to be taken by division and the balance of the revenue being levied in the shape of grazing dues. At the Summary Settlement under the British rule the revenue was fixed at Rs. 300 and apportioned on cattle only At the Regular Settlement (1863) it was fixed at Rs. 325 on the cultivated land of the revenue *taraf* and Rs. 850 on the jungle. In addition to the proprietors who contributed to the Revenue by payment of grazing dues there was also a certain number of non-proprietors who were charged grazing dues by the proprietors and from whom contributions were used in reduction of the Government Revenue or otherwise for the proprietor's benefit. These persons also claimed a share in the common land on petition, but their claims were disallowed by the Courts in India. According to the original agreement with the proprietors of the village, common land when partitioned was to be first divided according to *tarap* and then the land so attached to each tarap was to be divided among its proprietors according to Khewat shares (*i.e.*) the shares of persons entered in the Khewat or register of proprietor's holdings. In 1882 the proprietors of Lak applied for partition. The Assistant Collector ordered division on the basis of entire Jama of Rs. 1,175. This order was reversed by the Collector, with whom the Commissioner agreed on appeal in holding that Rs. 325 was alone to be taken into account for the purposes of partition; but the Financial Commissioner finally upheld the order of the Assistant Collector.

In 1890 a petition was filed in the Settlement Department for partition of the waste land in accordance with the order of the Financial Commissioner and was sent for disposal to the Extra Assistant Commissioner. In 1894 he decided to carry out partition only among the *tarap* and deferred partition *inter se* among the owners within the *tarap*, the partition being made on the

basis of entire Jama of Rs. 1175. In 1901 proceedings were set on foot for partition of the Shamilat of Tarap and Lak among the proprietors of that *tarap*. Objections were taken that the division should be made according to the Jama of the cultivated land assessed at the settlement and not on that fixed on the jungle land. According to the *Wajib-ul-arz* the Colonisation Officer and Collector tried the case as a revenue officer and held that the Jama on the cultivated area and that portion of the Jama on the jungle land which had been paid by proprietors should be the basis of division. On appeal the Settlement Commissioner reversed the decision on the ground that a question of title having been raised the Collector was bound to follow the procedure laid down by S. 117 of the Punjab Land Revenue Act, (23) of 1887. He also pointed out the impropriety of excluding from consideration that portion of the Jama on jungle land which had been paid by non-proprietors. The Collector then tried the case as a Civil Court and ruled that the partition should take place on the basis of the entire *Jama* the portion of the Jama on jungle land paid by non-proprietors being distributed over all the proprietors according to their Khewat on the cultivated area. The *measure* of each being (a) his own Khewat inside the cultivated area and (b) his proportionate share according to that Khewat of the Jama on the jungle land paid for by non-proprietors and (c) the amount he himself paid on account of the latter Jama. On appeal to the Chief Court, the judgment of the lower Court was confirmed. A petition for review on the ground that the appeal of the appellants had not been considered or decided by the Bench was rejected. The appellants then appealed to the Privy Council in due course.

Arthur Grey for appellants contended that the appellants and their ancestors had been throughout the settlement from 1857 up to the present time recorded as proprietors of the village in possession of certain waste sites upon which no land revenue had been assessed but in respect of which they had paid *tirni* (grazing) dues to the Government. The appellants were recorded as proprietors in the Khewat and according to the decisions of the Collector sitting as a Civil Judge they would be entitled to share in proportion to their contribution to revenue whether by way of direct assessment on land or by assessment in respect of cattle, charged upon the jungle of which they were recorded as in possession. The Collector in deciding the case in 1905 thought that the

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proper Khewatdars with claims in the Shamilat held claims on the strength of having undertaken a responsibility for the demand which did not fall on and was not taken by those whose land was entered as *Kharij parta.* He was wrong in holding this view, as the responsibility for the Government demand did fall on and was taken by the appellants. The Chief Court in dismissing the appeal had held that payment of *tirni* as a non-proprietor ought not to create a right in the Shamilat that the claims of those non-owners who had acquired rights in Lak to ownership by virtue of payment of tirni in other taraps seemed to be absurd and that they had no claim to a share. None of these findings were relevant to appellant's case (*i. e.*) that of proprietors who paid grazing dues but no revenue on cultivated land and their appeal was dismissed without ever having been considered. Mr. Justice Johnstone agreed in the order without any reference to appellant's case. The petition for review on the ground that the appellant's appeal had not been considered or decided by the Bench was presented on August 8, 1907 and Chatterji J. recorded, "Appellant says he has all along been paying *tirni.* If so, he may be entitled to a share as he is a recorded owner though his original holding is *Kharaj az parta.*" The review was heard, when the appellants were not represented by counsel, by Johnstone and Rattigan JJ. who decided that the petition for review was based on a misunderstanding of the principles on which the case was decided, that is to say, that only persons paying land revenue upon cultivation could share at all in Shamilat but that those persons *inter se* would share in Shamilat in proportion not to such revenue alone but in proportion to revenue plus *tirni* paid by each. No such principle was in fact laid down by the Bench who heard the case. Mr. Justice Chatterji's order on the petition for review seemed to contradict it while Johnstone J. in his order under review himself laid down that the idea seemed to have crystallised that payment for so much time created a proportionate right.

The respondents did not appear.

The Judgment of their Lordships was delivered by

Sir John Edge.—This is an appeal by the plaintiffs in the suit from a decree of the Chief Court of the Punjab, which had dismissed their appeal from a decree of the trial judge by which

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their suit had been dismissed. The respondents to this appeal have not appeared.

In their plaint, dated the 3rd May 1905, the plaintiffs alleged that they, "like the land-owners, are the proprietors" of houses and vacant sites in *Patti Lak* and had paid *tirni* (grazing dues) in respect of village *shamilat* land (common land) of *Lak*, and they claimed a declaration that they,

"like proprietors, may be declared co-sharers in 30,338 *bighas* 1¾ *kanals* of the "village *shamilat* land of *Patti Lak* in proportion to Rs. 29-15-7, the *tirni* paid by "the plaintiffs, and a share (may be) awarded to them in the said village *shamilat* "of *Patti Lak* on the said *tirni* amount according to the *Khewat*."

It is to be observed that in their plaint the plaintiffs did not base their claim to share on the partition of the common lands of *Patti Lak* upon any right as proprietors of any lands assessed to the revenue in *Patti Lak*. The plaintiffs were not recorded in the *Khewat* as persons paying land revenue in respect of land held by them in *Patti Lak*. They did not, in fact, hold any lands in *Patti Lak* which were assessed to the land revenue. What they claimed was that as they had paid grazing dues they should be treated in the partition of the common land of the village as if they were proprietors of the village, holding lands which had been assessed to the revenue. The trial judge rightly held that the plaintiffs had not proved any right to participate in the partition of the common lands and dismissed their claim. On appeal the Chief Court held that the payment of *tirni* by a person who was not a proprietor paying land revenue did not confer upon him any right to share in the *shamilat* of *Patti Lak*. The plaintiffs have failed to prove that they have any right to participate in the partition of the *shamilat* of *Patti Lak*.

Their Lordships will humbly advise His Majesty that this appeal should be dismissed.

Solicitors for Appellants :—*T. L. Wilson & Co.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Sir John Edward Power Wallis, Kt. Chief Justice and Mr. Justice Hannay.

Mahomed Jallaldeen Marakayar and others.	*Appellants (Defendants Nos. 1, 2, 12, 13, 14, 21 and L. R of the deceased 2nd Defendant).*
v.	
Vijayaswami *alias* Muthu Viyaya Raghunatha Annaswami Thevar and others.	*Respondents (Plaintiffs Nos. 1, 3, 5 and 6 and defendants Nos. 4 to 7, 9 to 11, 15 to 20 and L. R. of the deceased 1st Plaintiff).*

Mahomed Jallaldeen Marakayar *v.* Vijayaswami.

Suits Valuation Act—Mortgage—Suit for redemption—Jurisdiction—Valuation—Appeal—Forum—Court insisting upon payment of Court-fee on total amount payable on redemption—Payment by plaintiff of same—Effect.

In a suit for redemption of a mortgage, the principal amount of the mortgage must be taken as determining the jurisdiction under the Civil Courts Act (Madras).

The authority of *Zamorin of Calicut* v. *Narayana* [1] in this respect is unaffected by the enactment of the Suits Valuation Act.

Where in a suit instituted in the Subordinate Judge's Court for the redemption of a mortgage for Rs. 3,899-4-0, the Subordinate Judge erroneously insisted on the payment of a Court-fee on Rs. 7,218-6-11 the total amount payable on redemption and the plaintiff paid the deficiency, *Held* that did not deprive the District Court of jurisdiction to hear the appeal.

Vasudeva v. *Mahadeva* [2] followed, *Ijjatulla Bhuyan* v. *Chandra Mohan Bannerjee* [3], distinguished.

The appeal was accordingly returned for presentation to the proper Court.

Appeal from the decree of the Court of the Subordinate Judge of Madura East in O. S. No. 18 of 1900.

C. V. Anantha Krishna Iyer for the Appellants.

S. Srinivasa Iyengar for the Respondents.

The Court delivered the following

Judgment :—A preliminary objection is taken that the appeal lay to the District Court and not to this Court. The suit was to redeem a mortgage, and the amount of the principle debt was Rs.

*A. S. No. 203 of 1906. 10th Feb. 1915.

1. (1882) I. L. R. 5 M. 284 (F. B.) 2. (1892) I. L. R. 16 M. 326.
3. (1907) I. L. R. 34 C. 954. (F. B.)

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3,899-4-0. Prior to the enactment of the Suits Valuation Act, 1887 it was held in *Zamorin of Calicut* v. *Narayana* [1] by a Full Bench of this Court following earlier decisions that under the provision of the Madras Civil Courts Act the method of valuation prescribed by the Court Fees Act for suits of this description ought to be followed in ascertaining the valuation of the suit for purposes of jurisdiction. The Suits Valuation Act has not fixed any method of valuing such suits, nor has it apparently enabled such a method to be prescribed by rule. Consequently the authority of the decision in *Zamorin of Calicut* v. *Narayana* [1] is unaffected and the amount of the principal debt must be taken as determining the jurisdiction under the Civil Courts Act. The suit therefore lay in the Subordinate Court and the appeal lay to the District Court. The Subordinate Judge erroneously insisted on the payment of a Court-fee on Rs. 7,218-6-11 the total amount payable on redemption and the plaintiff paid the deficiency. The question then is whether this has deprived the District Court of Jurisdiction to hear the appeal and conferred it on the High Court. Following the decision in *Vasudeva* v. *Mahadeva* [2], we think it has not. A reference to the printed papers shows that in that case the District Munsif erroneously returned a plaint in a redemption suit as beyond his jurisdiction although it was properly valued on the principles laid down in *Zamorin of Calicut* v. *Narayana* [1]. The plaintiff accepted the valuation and filed the suit in the Subordinate Court and the Subordinate Court entertained it no doubt on payment of the appropriate Court-fee. It was held by this Court that the appeal lay none the less to the District Court, although the suit had been valued by the Subordinate Court at over Rs. 5,000. This appears to be a direct authority in support of the objection. The decision in *Ijjatulla Bhuyan* v. *Chandra Mohan Bannerjee* [3], related to a case in which the plaintiff was authorised to make a tentative valuation under S. 50 of the Code of Civil Procedure and Mookerjee, J., expressly confined his decision to such cases, and abstained from expressing any opinion on a case like the present. The objection is allowed with costs, and the appeal will be returned for presentation to the proper Court.

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1. (1882) I. L. R. 5 M. 284. 2. (1892) I. L. R. 16 M. 326.
3. (1907) I. L. R. 34 C. 954. F. B.)

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Mr. Justice Sankaran Nair and Mr. Justice Oldfield.

M. Chenga Reddi and others ... *Appellants* (Plaintiffs).*

v.

Vasudeva Reddi minor by Guardian Narasimha Reddi. ... *Respondent (2nd Defendant).*

Chenga Reddi *v.* Vasudeva Reddi.

Hindu Law—Adoption—Authority to adopt a specified person—Death of the son so adopted—Whether authority to make a second adoption could be inferred.

Where by the will of her deceased husband, a Hindu widow was directed to adopt a specified person, and the boy so adopted died.

Held, per Sankaran Nair, J., that under the authority so given, the widow could make a second adoption on the death of the first adopted son.

If the intention of the husband that he should be represented by an adopted son is clearly expressed in the will, the adoption should be upheld unless there is anything in the will to show that a second adoption should not be made.

Per Oldfield, J.: The authority being only for the adoption of a specified person, authority for a second adoption could not be inferred.

Appeal against the decree of the Dt. Court of North Arcot in O. S. No. 3 of 1912 (O. S. No. 3 of 1912 on the file of the Court of the Subordinate Judge of North Arcot).

[The facts of the case are fully stated in their Lordships Judgment].

L. A. Govindaraghava Iyer for appellants : The second adoption is invalid. Ex. A is clear that the idea of the deceased testator was to adopt the particular boy Chenga Reddi. He was unable to make the adoption himself and therefore directed his wife to fulfil his intention. It was not the intention of the testator to have an adoption at all events, with a preference for Chenga Reddi. It was not left to the widow to adopt whomsoever she liked. The arrangements with regard to the property are with reference to this particular boy. By referring expressly to Chenga Reddi, the testator must have impliedly interdicted the adoption of any one else. The will does not contemplate a second adoption.

An authority to make a particular adoption is exhausted with that adoption. The power given to the widow contemplates only the adoption of Chenga Reddi and is exhausted as soon as the adoption is made. A power to adopt should be strictly con-

* A. S. No. 161 of 1913. 9th March 1915.

strued. In *Surendra Keshav Roy* v. *Doorga Sundari Dossee* [1] power given to two widows simultaneously was held to be bad. The power was not good even as evidencing a general intention to adopt. In *Amrito Lall Dutt* v. *Surnomoyee Dasi* [2], a power to the widow and the executors jointly to adopt was held to be bad. An adoption made under such a power could not be validated by spelling out a general intention to adopt from the will. Such a construction would be beyond the range of judicial interpretation. In *Mutafaddi Lal* v. *Kuldan Lal* [3] it was held that a power to adopt should be strictly pursued. See *Narasimha* v. *Parthasarathy* [4] where a power to adopt given to two widows was held to be put an end to by the death of one of the donees of the power. These cases lay down that a power to adopt should be construed strictly. Otherwise it would be making a new will for the testator. An addition to the testamentary dispositions in a will is not within the province of a court. See *Narasimha* v. *Parthasarathy* [4]. On all these grounds the adoption of the 2nd defendant is invalid.

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T. R. Ramachandra Ayar for respondents: I submit that on a proper construction of the will, a general power to adopt may be implied and that the second adoption is valid. The testator refers to the absence of male issue at the beginning of his will. He also expresses the hope that his 2nd daughter may have more sons, evidently contemplating the contingency of Chenga Reddi's death and a 2nd adoption of the second daughter's son.

The testator evidently wanted to have a male issue adopted to him and expressed a preference for Chenga Reddi. Assent of the kindred *per se* does not validate an adoption. For example, if the testator had expressly prohibited an adoption, assent of the kindred is ineffective. The assent implies the existence of an authority to adopt. Assent to an adoption must be presumed in the absence of express prohibition. See *The Collector of Madura* v. *Mootoo Ramalinga Setupathi* [5]. Specifying a child for adoption does not prevent the adoption of another if the one specified dies or is refused by its natural parents. See *Laksami Bai* v. *Rajaji* [6]. See also West and Buhler, Vol. II, p. 955. The husband's

1. (1892) I. L. R. 19 C. 513. 2. (1900) I. L. R. 27 Cal. 996 s. c. 27 I.A. 128.
3. (1906) I. L. R. 28 A. 377. 4. (1914) I.L.R. 37 M. 199 s.c. 26 M.L.J. 411.
5. (1869) 12 M.I.A. 397 at 443. 6. (1897) I.L.R. 22 B. 996.

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authority is not exhausted by a single adoption. She can act upon it again in case of necessity and make a second adoption. See *Iyah Pillai's case* [1]. In *Suryanarayana* v. *Venkataramana* [2], the Privy Council uphold the decision in *Suryanarayana* v. *Venkataramana* [3]. The result of the decisions is that in the absence of an express or implied prohibition, a second adoption by a widow is valid. Courts should not be too astute to defeat an adoption but should rather do their utmost to support it. See *Surendra Nandan* v. *Sailaja Kant* [4]. The cases cited by the other side are distinguishable. In *Surendra Keshub Roy* v. *Doorga Sundara Dassi* [5], there was a simultaneous adoption of two boys, a thing unknown to the Hindu Law. In *Amrito Lall Dutt* v. *Surnomoyi Dasi* [6], the testator gave no authority to the widow, but to her and two other executors. This was also in violation of the Hindu Law. In *Narasimha Appa Rao* v. *Parthasarathi Appa Rao* [7], there was no direction to adopt. It was left to the option of the widows to make an adoption. The power to adopt was given to two widows jointly. There was no religious motive in the testator's mind. In this case the will makes it clear that there shall be an adoption. All that the cases lay down is, that if the language of the will warrants any prohibition of adoption you shall give effect to it. Substantial compliance with the wishes of the testator is enough. See *Mutafaddi Lal* v. *Kuldan Lal* [8]. In this case the prohibition is only to this extent that if Chenga Reddi is available, the widow could not adopt another. Otherwise there is no prohibition of an adoption. The widow has not committed a breach of the power. The 2nd adoption is valid.

L. A. Govindaragava Aiyar in reply: A direction to adopt does not mean that any adoption made by the widow is validated, or that the widow is bound to adopt. *Lakshmi Bai* v. *Rajaji* [9] is not in point? A widow can adopt without her husband's authority in Bombay.

[*Sankaran Nair, J.*:—The law in Bombay is the same in so far as a widow is bound to respect the wishes of her husband if he points to a particular boy to be taken in adoption. The distinction you point out is not material for the purposes of this case.]

1. Strange's Notes of Cases 78. 2. (1906) I.L.R. 29 M. 382 s. c. 16 M.L.J. 276.
3. (1903) I.L.R. 26 M. 681: 13 M.L.J. 318. 4. (1891) I. L. R. 18 Cal. 385.
5. (1892) I. L. R. 19 Cal. 513. 6. (1900) I. L. R. 27 C. 996.
7. (1913) I. L. R. 37 M. 199 s. c. 26 M. L. J. 411.
8. (1906) I.L.R. 28 A. 377. 9. (1897) I. L. R. 22 B. 996.

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In *Suryanarayana* v. *Venkataramana* [1] there was a general power to adopt without any restriction on the widow's choice. The whole question is whether the authority is general or special. Here there is a selection, not merely a permission to adopt. The testator did not contemplate the possibility of a second adoption. The will shows that he expected Chenga Reddi to survive him. Otherwise the direction to the wife to make over the property to him is meaningless. The authority must be found within the four corners of the will. See *Narasimha Appa Rao* v. *Parthasarathi Appa Rao* [2].

The Court delivered the following

Judgments: *Sankaran Nair, J.* :—The suit was brought by the plaintiffs as the reversioners of one Chenga Reddi, deceased, the admitted owner of the properties in suit, to set aside an adoption made by his adoptive mother Subbamma, the 1st defendant to her deceased husband. The plaintiff's case is that Subbamma was not authorised by her husband to make a second adoption. The District Judge of North Arcot dismissed the suit, holding that she had been authorised. The plaintiffs appeal.

The authority is alleged to be given by a will executed by the husband of the 1st defendant shortly before his death. The will is in the following terms:—

"The will dated the 8th Avani of Vishu—22-8-1881) executed by one Mogili Reddigari Chenga Reddi of Thondanada Village, Chandragiri Taluk, in favour of yourself Subbu, my wife is as follows:—We have no male issue, but have only got (1) one elder daughter Subbamma and (2) one second daughter Chinna Subbamma, the said elder daughter having two sons and the second daughter one son and one female (issue). She may still give birth to more children. As I am certain that the disease of dropsy which I am now suffering from would grow worse and my last days are at hand and as, according to my intention, there is no time to adopt Chenga Reddi, the second son of my said elder daughter, you shall after my demise adopt the said boy and the particulars of direction you have to carry out in regard to the whole of my estate are as follows:—(Here properties are described). You shall put the above mentioned properties in possession of the said adopted son at the end of your lifetime (during your last

1. (1908) I. L. R. 26 M. 681 & (1906) I.L.R. 29 M. 382.
2. (1914) I. L. R. 37 M. 199. s. c. 26 M. L. J. 411.

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moments.) You know for the maintenance of my step-mother Pedda Ame *alias* Chengamma, a Karar (agreement) has been executed by her in October in 1865, and she has been enjoying the lands, etc., which have been granted to her for maintenance for her whole life. She shall enjoy the said properties according to the terms of the said Karar. As the outstandings due to me, the amounts due to me under decrees, silver, gold and cash amounts altogether to about Rs. 50,000 at present you shall collect the said debts, keep the said properties in your possession, have the said adopted son in your care and protection and after, at the time of your death considering the then circumstances and agreeably to the estate, making such gifts as may be proper in favour of your two daughters and the other grandsons) sons of your daughters, deliver the whole of the remaining estate to the said adopted son. This is the will got written out of my free will by Chamala Munusamy."

After her husband's death the 1st defendant adopted Chenga Reddi, the second son of her elder daughter, Subbamma. He died and she has since adopted the 2nd defendant in the suit who is the son's son of the younger daughter, Chinna Subbamma.

Now, it is argued before us that there is a direction in the will to adopt only Chenga Reddi; that nowhere is any authority expressly given to make a second adoption on his death, nor is there anything in the will itself to imply such an authority.

It is also argued that it was the testator's intention, as expressed in the will to make the adoption himself, and it was only his physical inability to do so, that put off the adoption, and that if he had adopted Chenga Reddi himself, there would have been no will and there would have been no authority given.

It is further contended that the provisions in the will that the widow, the 1st defendant should surrender possession of the properties to the said adopted son at the end of her lifetime shows that the testator did not contemplate the necessity of another adoption, or, in other words, the contingency of the death of the adopted son, and therefore no implied authority for a second adoption is to be found in the document. These arguments are of great weight.

On the other hand, it is contended that according to the rule of construction laid down by the decisions of this Court and the Judicial Committee of the Privy Council, we are bound to uphold the adoption. It is argued that the testator having clearly expressed

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his desire that he should be represented by an adopted son, and the widow having been authorised to adopt, effect must be given to his intention.

In the earliest case brought to our notice *Veeraperumal Pillai* v. *Narain Pillai* [1] the authority was contained in the following words: of the husband's will "If Ayya Pillai beget a son besides his present son you are to keep him to my lineage." Sir Thomas Strange affirmed the validity of the adoption made by the widow of another boy, holding that she was not bound to wait indefinitely. It is argued by Mr. Govindaraghava Aiyar, that there was another provision in that will on which stress was laid by Sir Thomas Strange to show a primary intention on the part of the testator to be represented by an adopted son, and that Sir Thomas Strange said, with reference to that provision that it indicated an intention that the adoption should not be confined to any particular person or family, and therefore he drew the inference that it was only a case of preference which the testator expressed that a son of Ayya Pillai should be adopted if available. This may be conceded but at the same time on reading the Judgment there is no doubt that Sir Thomas Strange was of opinion that, if possible, effect should be given to the desire of the testator to be represented by a son. He said:—"of the advantages which, in the religious belief of the natives, depend upon this mode of substitution, where a man has no son of his own, their books are full; and yet, important as they are, we may readily imagine that the provision for it is fraudulently reserved for the chamber of disease, and the hour of dissolution when pain and alarm often deprive us of the distinct use of every faculty, and leave us no power but that of expressing a general sentiment or announcing a vague wish. In such a state, will the law of the Hindu have best shown its wisdom in a matter upon which his happiness after death is supposed to depend by requiring that, at the peril of his soul remaining in *put*, he shall specify a name which he cannot recollect, and declare a preference which it may be impossible for him at that moment to feel, or by leaving it to the affectionate discretion of his surviving partner, consulting, as it is her duty to do, with his nearest friends and relations, to substitute for him the person whom he would in all probability have himself preferred had he proceeded to adopt in his lifetime, or had it occurred to him before his death to express a preference."

1. Strange Notes of Cases 104.

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The next authority that is relied upon by the respondents' pleader is the judgment of Farran, C.J., in *Lakshmibai* v. *Rajaji* [1]. It was pointed out by the Chief Justice that it was common for a husband authorising an adoption to specify the child he wishes to be taken and should that child die, or be refused by his parents, the authority would still be held to warrant the adoption of another child unless there is something in the will itself to show that the husband did not desire any other adoption to be made. The ground of decision was stated to be that a person desires an adoption and when he specifies the object, he simply indicates a preference.

According to this view, the question for decision is not whether a husband only gives permission to his wife to adopt, leaving it entirely to her discretion, to decide whether an adoption should be made or not, but whether he gives an imperative direction to her to adopt which she, as an obedient wife, was bound to obey. It was argued by the appellant's pleader that this decision is not an authority to be followed in Madras because, in Bombay, a widow is authorised to make an adoption without any authority from the husband, and that the judgment must therefore be understood with reference to that rule of law. But it may be pointed out that this difference exists only when the husband is an undivided co-parcener and the reasoning of the Judge does not proceed on any such distinction. The case on which reliance is placed by the District Judge and by the pleader of the respondents, is the judgment in *Suryanarayana* v. *Venkataramana* [2], confirmed by their Lordships of the Judicial Committee of the Privy Council in *Suryanarayana* v. *Venkataramana* [3]. In that case the husband authorised his wife to adopt a son and died. The widow adopted a son in pursuance of that authority, but that son also died. The widow adopted a second time.

It was held by the High Court that the husband's authority was not exhausted by the first adoption, but held good for the second adoption also. In that case the authority was "in general terms requiring her to adopt so as to continue the line and to provide for his spiritual benefit." In that respect, it differs from the case before us. There was no direction to adopt any particular boy. But in delivering their judgment the learned Judges of this

1. (1897) I. L. R. 22 B. 996. 2. (1903) I. L. R. 26 M. 681. s. c. 13 M. L. J. 318.
3. (1906) I. L. R. 29 M. 382. s. c. 16 M. L. J. 276.

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Court said " We are of opinion that the husband's authority held good for the second adoption also. The object and purpose of the authority given by the husband was to perpetuate his family as well as to secure his spiritual benefit and it would be unreasonable to hold that an accident such as the early death of the boy first adopted should be allowed to frustrate the fulfilment of his object and to preclude the widow from making another adoption in the absence of any legal impediment to her doing so. When the general intention of a Hindu to be represented by an adopted son is clear, as in this case, there seems no reason why effect should not be given to such intention if it is possible to do so without contravening the law". " And they refer to *Iyah Pillai's case* and the judgment in *Lakshmi Bai* v. *Rajaji* [1] already referred to. The learned Judges also relied upon Morley's Digest to show instances where a widow makes a second adoption on failure of the first by death in fulfilment of a single injunction or authority of her husband, the object of such injunction being unattained unless the child live".

The learned Judges go even further and refer to a decision in *Ramaswami Aiyar* v. *Venkataramaiyar* [2] as justifying an adoption by a widow to carry out the husband's general intention even where the husband did not directly give authority for the adoption. The judgment of their Lordships in that case, (6 I. A. 196) does not, it appears to us, bear out the inference drawn by the learned Judges. There is no doubt, however, from this judgment that where the husband has clearly expressed his intention to be the perpetuation of the family and the securing of his spiritual benefit, the death of the boy first adopted should not stand in the way of the widow making another adoption if there is no legal impediment to her doing so. Of course, any direction in the will, express or implied, against a second adoption must be given effect to and even if she is otherwise competent in law to make an adoption, she cannot do it. This judgment was affirmed by their Lordships of the Privy Council. In the judgment they cite with approval the passage above extracted from the judgment of this Court. They refer with approval also to an expression of opinion by the Calcutta High Court that, considering the religious efficacy that ensues from an adoption a

1. (1897) I. L. R. 22 B. 996. 2. (1882) L. R. 6 I. A. 196.

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court "should rather do its utmost to support it unless such adoption is clearly in excess or in breach of the power to make it," and, in pointing out the limitations to the application of the rule, they refer to their own judgment in the *Collector of Madura* v. *Mootoo Ramalinga Sethupathi* [1], that the authorities in favour of a widow's power to adopt with the assent of a kinsman proceed in a great measure upon the assumption *that his assent to this meritorious act is to be implied wherever he has not forbidden it*, and they proceed to indicate the circumstances in which such a prohibition by the husband may be inferred. They also express dissent from the view of the Calcutta High Court that where the widow is directed to adopt a son she cannot adopt a second son if the first adopted son dies. The decision of the Calcutta High Court was based on the ground that as there was no permission to adopt one child after another the widow was not authorised to make a second adoption.

There is little doubt that in the opinion of their Lordships of the Privy Council if the intention of the husband that he should be represented by an adopted son is clearly expressed in the will, the adoption should be upheld unless there is anything in the will to show that a second adoption should not be made.

In the case before us, there is very little doubt of the husband's general intention. He wanted to adopt a son himself and he could not carry out his intention on account of his inability to do so. He expresses his regret in that she must adopt her daughter's second son. The general intention therefore is perfectly clear. It is true that he did not contemplate the contingency of the adopted son's death. But it is not always that a testator likes to refer to such an unauspicious circumstances in a will.

Is there anything, then, to imply an intention on the part of the husband against a second adoption? Having regard to the rules laid down by the Judicial Committee of the Privy Council in the passage in *Collector of Madura* v. *Mootoo Ramalinga Setupati* [1], extracted by their Lordships in their judgment in *Suryanarayana* v. *Venkatarama* [2], there is nothing in the disposition of his property or in the circumstances of the family to support that contention. The will shows a clear intention that the bulk

1. (1869) 12 M. I. A. 397 at 443.
2. (1906) I. L. R. 29 M. 382 : s. c. 16 M. L. J. 276

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of his property should be taken by one of the descendants, and a desire to benefit also his other descendants. If the widow had no power to make a second adoption, this intention will be clearly frustrated. In the absence of any second adoption the property would not go to his own natural heirs, that is to say, his daughters and daughter's sons, but it would go to the heirs of his first adopted son, *i.e.*, the plaintiffs. An intention, therefore to direct the property from his natural heirs, *i.e.*, his daughters and their issue has to be imputed to the testator if we deny the widow any authority to make a second adoption. The probabilities are that if he had fully expressed his intentions he would have authorised the widow to make another selection from his descendants.

Mr. Govindaraghava Aiyar relied upon the opinion of the Judicial Committee in *Surendro Keshub Roy* v. *Doorga Soondary Dossee* [1], and *Amrito Lal Dutt* v. *Surnomoye Dasi* [2] to show that even where there is a direction by the husband to make an adoption the widow was held not entitled to carry out that intention. It is true that in the earlier case there was a direction to his two widows by the testator for each of them to adopt a son. But the adoption was held invalid on the ground that the will authorised only the simultaneous adoption of two sons and no other course. It was impossible to carry out, therefore, the testator's wishes unless two sons were adopted and such adoption was held to be illegal. The question, therefore, did not turn upon the nature of the power given to a widow to adopt, but upon the illegality of the power itself. In the other case *Amrito Lal Dutt* v. *Surnomoye Dasi* [2], a husband purported to authorise his widow jointly with two other persons, to adopt a son to him. This authority was held to be illegal. In these cases the widow could not make any adoption at all, the question whether she could make a second adoption did not arise. Nor is the decision of their Lordships of the Privy Council in the *Nidadavolu case*: *Narasimha* v. *Parthasarathy* [3] in point. In their judgment the Judicial Committee said "He (that is the testator) does not direct that there shall be an adoption, as he would naturally have done had he wished in all events to secure that there should be a son to perform the due religious rites. He makes it depend

1. (1892) I. L. R. 19 C. 525. 2. (1900) I. L. R. 27 C. 996.
3. (1914) I. L. R. 37 M. 199, s. c. 26 M. L. J 411.

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on the opinion of his widows *whether* and when an adoption should take place." The principle herein laid down is certainly not in support of the appellant's contention.

For these reasons I am of opinion that the adoption is valid. But as my learned brother disagrees with me the decree of the lower Court is confirmed and appeal dismissed with costs under S. 98, C. P. C.

Oldfield, J:—The question is whether the will, Ex. A, authorised the testator's widow to adopt a second time after the boy, whose adoption was specifically permitted by it, had been adopted by her and had died. I differ from my learned brother on a question of the kind with great diffidence. But I do not think that the answer should be in the affirmative.

It is unnecessary for me to follow him in the majority of his references to decisions. For I accept his conclusion that a Hindu testator, who authorises an adoption generally must be presumed to do so with the primary intention that his widow shall secure his posthumous representation by an adopted son and make successive adoptions, until the object is secured. Here, however, the question is of a conflict between that presumption and what are alleged to be restrictions on the use of the widow's authority, implied in the terms conveying it, especially in the specification of the boy to be adopted. Only two of the decisions deal directly with such a case. The others merely lay down the presumption already stated in cases in which the authority was expressed in general terms: they did not and had not to deal with restrictions on it and therefore, afford very little guidance.

The first of these two decisions in *Veeraperumal Pillai* v. *Narain Pillai*[1], is no doubt based on the presumption and applied it, although the authority specified the boy to be adopted. It, however, really carries the argument very little further. For, firstly the application of the presumption could in fact be supported by the language of one of the collateral dispositions of property in the will. And secondly, the specification was of a boy unborn, though his mother was pregnant at the date of the will; and, after the boy thus born to her had died some months before the testator and before his will had effect, the latter did not change it, though the mother had no other issue. In the circumstances the Court might well decide a posthumous representation, subject only to a restriction, which

1. 1 Strange's Notes of cases 78.

had, to his knowledge, become inoperative, and give effect to the presumption it had formulated. There was not at the date, when the will spoke, or later any boy, specified by it, in existence; and the authority had to be treated as general, or given no effect at all. The case, therefore, differed entirely from that before us, in which such a boy was available and the restriction on the authority could be and was given effect, when the latter had to be exercised.

The other case, in which an authority to adopt a specified boy was in question, *Laxmibai* v. *Rajaji* [1], is important, because, although it was decided in Bombay, it is referred to by the High Court and the Privy Council in *Suryanarayana* v. *Venkataramana* [2], as supporting the conclusion therein. But the authority in the latter case indicated no particular person for adoption by name or otherwise and placed no restrictions whatever, on the wife's discretion, the decision turning in both Courts on the general validity of the presumption already referred to, which (in the absence of restriction on the authority) was sufficient to support the adoption. *Laxmibai* v. *Rajai* [1], was no doubt, a case, in which an adoption of a boy other than the one specified, was upheld, when the latter was not available. But, firstly, as in *Veeraperumal* v. *Narain Pillai* [3], the authority, as restricted by the testator, turned out to be ineffectual through causes beyond the widow's control. And next, the case must in my opinion be distinguished on a more general ground, that the law under administration was different. For, though the judgment contains nothing explicit on the point, the first portion of it is statedly based on the law of the Bombay Presidency; and the facts that no co-parceners were parties and that the adoption was disputed by a widow indicate that the deceased testator was a divided co-parcener, since, on the contrary assumption the widow would, whether or no the adoption was valid, have been entitled to a maintenance and have had no interest in disputing it. If the decision is, as must be supposed, one regarding the widow of an undivided coparcener, the question would be of her general and subsisting right to adopt and of its revival, when the restriction placed on it by her husband turned out ineffective in the present case, where the widow has no power to adopt independently of her husband's authority and the question is whether after a restricted authority

1. (1897) I.L R. 22 B. 996. 2. (1903) I L.R. 26 M. 681 (1906) I.L.R. 29 M. 387.
3. Strange N. C. 78.

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has been acted on ineffectually, her possession of an unrestricted one can be presumed In these circumstances, the decision is not of assistance. And it is not necessary to treat it as imposed on Courts in this Presidency, as authoritative, by either of the judgments above referred to. For, those responsible for them cannot be supposed to have overlooked the indications that it related to a divided family or to have disregarded the distinctive character of the law under application. The references to it were made to support the liberal rule of construction which the learned Judges and their Lordships were applying to the authority before them and are. I would respectfully suggest, explicable as relating to the second ground of decision, on which also the Bombay judgment was based.

Two Calcutta cases, *Surendro* v. *Doorga Soondary Dosee* [1] and *Amrito Lal Dutt* v. *Surnamoye Dasi* [2] were relied on by the appellant. The authorities in them were however invalid *ab initio*, since they conferred no power exercisable by the widow under Hindu Law, and the decisions regarding them therefore afford no guidance.

In the result, the two cases dealing with authorities specifying a particular boy are distinguishable from that before us; and the remaining cases dealing with unrestricted authorities, contain nothing directly relevant. There, however, occur in them some incidental references to the construction of restrictions on authorities, and I refer to them before dealing with the provisions of the will before us. Earlier in this judgment I stated the question in issue as being of the conflict between the general presumption as to a testator's intention and the explicit or implied restriction, which the will is alleged to contain. But it would have been more accurate to use no knowledge which could suggest that the two were to be considered together and the latter weighed against the former. For, the proper course is, as I think, first to attempt to ascertain with reference to the testator's own words and without reference to the general presumption whether he meant to restrict the authority he was conferring, and to have recourse to that presumption only after such attempt has failed. It is true that in *Veeraperumal Pillai* v. *Narain Pillai* [3] the collective effect of the Pundits' opinions in favour of the general presumption is referred to as "repelling the construction attempted to be put upon the will by the defendants, and the intention

1. (1892) I. L. R 19 C 531. 2. (1900) I. L. R. 27 C. 996
3. ( ) Strange N. C. 78

of the testator ever so plainly required it" (page 98). But it was not necessary for the Court in that case to endorse those opinions to that extent. For immediately afterwards it pointed out only that, where (as in the case before it) no such intention was expressed or was necessarily to be implied, none could be assumed and the general presumption as to the testator's object could be relied on. Again, whilst the High Court in *Suryanarayana* v. *Venkataramana* 1, said that "when the general intention of a Hindu to be represented by a son was clear, there seemed to be no reason why effect should not be given to such intention, if it were possible to do so without contravening the law. Each case must be decided on its own merits without applying too strict a rule of construction with regard to powers of this description," the Privy Council held, consistently with the conclusion above stated, that "the main factor for consideration is the intention of the husband. Any special instructions he may have given his widow must be strictly followed; where no such instructions have been given but a general intention has been expressed to be represented by a son, effect should, if possible, be given to that intention." And their Lordships have given the clearest expression to these views in a very recent case *Narasimha* v. *Parthasarathy* 2. In one passage in the judgment (page 223) they declined to treat the testator's motive as religious at all, because his language showed that it was secular. In another (page 222) they recognised that surrounding circumstances (including race and religious opinions) deserved consideration in arriving at a right construction of the will and ascertaining the meaning of its language "as used by that testator in that document." But they held that "so soon as the construction is settled, the duty of the Court is to carry out the intentions expressed and none other. The Court is in no case justified in adding to its testamentary dispositions....If they have any eventuality unprovided for, the estate must in case that eventuality arises, be dealt with according to the law, which provides for succession of property in the absence of testamentary directions applying thereto. But the Court never adds to a will anything which needs to be done by testamentary disposition."

The terms of the will in this case must accordingly be construed strictly as they stand and without any addition to them

1. (1903) I.L.R. 26 M. 681. 2. (1914) I.L.R. 37 M. 199 s. c. 26 M.L.J. 40.

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to provide for subsequent eventualities or expansion of them based on any presumed intention of the testator. I note first the statement that he had no time to adopt Chenga Reddi, as he intended to do so; and here, as later, I can find no reason for assuming what he could easily have expressed if he had wished, that his intention to adopt was not restricted to Chenga Reddi, but was general. There is next the direction to the widow to adopt Chenga Reddi, followed by no provision for the contingency of the latter's death or the refusal of his parents to give him. The result, as I read it, is that testator gave an authority to adopt, restricting its operation to Chenga Reddi; and I find myself unable to understand how a testator, who certainly did not trust his widow unreservedly in the action which he authorised expressly, can be presumed to have authorised her to take further action by implication or to have meant to leave him to do so unfettered. And lastly, as regards the absence of any provision for future eventualities the testator's attitude is made yet clearer by his reference to the devolution of his estate on the adopted son on his widow's death and the assumption it involved that the former would survive the latter. That assumption was, as already observed, involved also in the restriction of the widow's authority. Its repetition makes it the more difficult to disregard it. The omission to provide for this eventuality in connection with the direction to adopt was merely tacit; but, as shown, authority would forbid the Court even in those circumstances to supply it by implication. The Court's disability to do so is the clearer, when, as is the case here, the testator has selected not to provide for this eventuality, though he has provided for its converse; and the inference must be that he was either indifferent or content to leave his widow to adopt with the consent of the *sapindas*. It is not possible to supply the omission by any expedient, which would add to or modify the will, as that proposed by respondent would do. My conclusion therefore is that the will authorises no second adoption after the failure of that of Chenga Reddi.

I would therefore reverse the Lower Court's finding on issue 1. If this were the decision of the Court, it would be necessary to proceed to deal with issues 4 and 5. I do not do so, because in accordance with my learned brother's judgment, the appeal must be dismissed with costs.

PRIVY COUNCIL.

Present:—Lord Atkinson, Sir John Edge and Mr. Ameer Ali.

[On Appeal from the High Court at Allahabad.]

Padarath Halwai and others ... *Appellants.* *

v.

Pandit Ram Narain Upadhia and others ... *Respondents.*

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Padarath Halwai *v.* Pandit Ram Narain Upadhia.

Mortgage—Attestation—Transfer of Property Act, IV 1882, S. 59—Pardanashin ladies—Not seeing the face of when signing—Suit by second mortgagee of one of the properties comprised in plaintiff's mortgage—Inadvertent passing of decree postponing plaintiff—Effect of—Plaintiff entitled to enforce his mortgage against other properties—Purchasers in execution of second mortgagee's decree under S. 90.

Where it was objected, that a mortgage executed by two Pardanashin ladies was not duly attested because the attesting witnesses did not see the ladies' faces when they signed but it appeared that the witnesses saw them sign and recognised their voices though by reason of a *chik* between, they were unable to see their faces. *Held,* that the attestation was sufficient in law.

In a suit upon a second mortgage of one of the properties comprised in the plaintiffs' mortgage, a decree was inadvertently made that the plaintiffs should be paid the amounts due to them out of the balance remaining after satisfaction of the second mortgagee's claim. *Held,* that this did not preclude the plaintiffs from enforcing their mortgage against the other properties included in their mortgage though they had been in the meanwhile purchased by the defendants in execution of the decree in favour of the second mortgagees passed under S. 90 of the Transfer of Property Act.

Consolidated appeals from a judgment and decrees of the High Court, at Allahabad dated March 29, 1909, modifying a judgment and decree of the Subordinate Judge of Jaunpur dated May 25, 1905.

The facts of the case are sufficiently set forth in their Lordships' Judgment. When the case came on for hearing it was contended that the attestation of the mortgage as required by S. 59 Transfer of Property Act (1912) was not proved according to the interpretation of the section in *Shamu Patter's case* [1]. Their Lordships remanded the case for further evidence. On remand both sides let in evidence before the Subordinate Judge and the High Court forwarded its own findings.

Sir Erle Richards, K. C., with *K. Brown* for the appellants contended that according to S. 59 of the Transfer of Property Act, the document must be signed in the presence of at least two witnesses who must see the execution of the document. The

* 8th June 1915.

1. (1912) L. R., 39 I. A. 218; 23 M. L. J. 321.

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evidence is not satisfactory that the witnesses saw the execution of the deed by the ladies. Even if the attesting witnesses saw the hand signing and identified them by their voices that was not enough to do away with the precaution against fraud. The evidence as it stands does not amount to attestation. *Shamu Pattar's case* [1], and *Fresfield* v. *Reed* [2], *Casement* v. *Fulton* [3], referred to. Further under the mortgage of the respondents they had waived their priority and Baragaon was relieved of all liability for the amount due thereunder. The respondents having given up that security there should be a proportionate reduction. Reference was made to *Jugul Kishore* v. *Kedar Nath* [4], *Imami Ali* v. *Baij Nath*, [5] S. 97, Transfer of Property Act.

De Gruyther, K. C. and Dube for the respondents. The evidence in the case brings the case within the decision in *Shamu Pattar's case* [1]. The two witnesses giving evidence were present. *Fresfield* v. *Reed* [2] and *Parke* v. *Mears* [6] were referred to.

On the 2nd point their Lordships did not hear him.

Sir Erle Richards replied.

The Judgment of their Lordships was delivered by

Sir John Edge—These are consolidated appeals from decrees, dated respectively the 29th March 1909, of the High Court of Judicature at Allahabad. The two decrees appealed from were made in appeals in the same suit. The suit was brought in the Court of the Subordinate Judge of Jaunpur on the 29th November 1904 to enforce, by sale of the village Baragaon and other villages the payment of Rs. 65,809 odd, due under a mortgage dated the 25th June 1892. The Subordinate Judge decreed the claim in part and in part dismissed it. Each side appealed to the High Court at Allahabad. The High Court dismissed the defendants' appeal, and in the plaintiffs' appeal gave them a decree for their claim.

When these consolidated appeals first came on for hearing before this Board, it was contended on behalf of the appellants that the mortgage upon which this suit was brought had not been attested by at least two witnesses, and as the amount secured by it exceeded one hundred rupees the alleged mortgage was ineffec-

1. (1912) L.R., 39 I.A. 218; 23 M.L.J. 321.
2. (1842) 9 M. & W. 404.
3. (1845) 5 Moore P.C. 130: s.c. 3 M.I.A. 395.
4. (1912) I. L. R. 34 A. 606.
5. (1906) I. L. R. 33 C. 613.
6. (1800) 2 B. & P. 217.

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tive and could not be given in evidence. That point had not been raised in either of the Courts below. Under the circumstances this Board remanded the case to the High Court in order to enable the parties to produce evidence on the question of attestation. Evidence on that subject has been taken and has been returned to this Board. On behalf of the appellants it has now been contended that the evidence which was given on the remand in proof of the attestation was unreliable, and, even if accepted as true, did not prove that the two attesting witnesses who gave evidence on the remand had seen the mortgagors sign their names to the mortgage.

The mortgagors were two *purdanashin* ladies who did not appear before the attesting witnesses, and consequently their faces were not seen by the witnesses. These two attesting witnesses were, however, well acquainted with the voices of the ladies, and their Lordships are satisfied that these two attesting witnesses did identify the mortgagors at the time when the deed was executed. The mortgagors were, on the occasion of the execution of the mortgage deed, brought from the *zenana* apartments of the house in which they were to an ante-room to execute the deed. In the ante-room the ladies seated themselves on the floor, and between them and these two attesting witnesses there was a *chick*, which was not lined with cloth, hanging in the doorway. These two attesting witnesses recognised the ladies by their voices, and they say that they saw each lady execute the deed with her own hand, although owing to the *chick* they were unable to see the face of either of the ladies. On the other side an attempt was made to prove that a *tat*, through which nothing could be seen, was hanging in the doorway. Their Lordships accept the evidence of these two attesting witnesses as true, and hold it proved that the mortgage deed of the 25th June 1892 was duly attested by at least two witnesses within the meaning of S. 59 of the Transfer of Property Act, 1882. It is not disputed that the mortgage deed was in fact the deed of the two *purdanashin* ladies, Musammat Niamat Bibi and Musammat Kamur-un-Nisa Bibi, the mortgagors.

The only other question to be considered in these appeals is the contention on behalf of the appellants that the plaintiffs in the suit have by reason of certain events, which will now be referred to, lost their right to enforce against Baragaon payment of a considerable part of the amount which they have claimed.

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On the 8th August 1887 Musammat Niamat Bibi and Musammat Kamur-un-Nisa, who will be hereafter referred to as the mortgagors, mortgaged the villages Arghupur and Baragaon, to Sarju Parshad and Ramanand to secure Rs. 12,000 and interest thereon. On the 19th February 1892 the mortgagors mortgaged Arghupur to Lukshmi Prasad and others to secure Rs. 30,000 and interest thereon. The mortgagees of the 19th February 1892 and their representatives in title will hereafter be referred to as the second mortgagees. On the 25th June 1892 the mortgagors by their deed of that date mortgaged Arghupur and Baragaon, together with three other villages, to Sarju Parshad and Ramanand to secure Rs. 32,000 and interest thereon. This sum of Rs. 32,000 included a sum of Rs. 18,000 principal and interest then due under the mortgage of the 8th August 1887. On the 20th May 1893 the mortgagors further mortgaged Arghupur to the second mortgagees to secure Rs. 21,324 and interest thereon. Sarju Parshad is dead; he is represented in this suit by his son, Ram Narain, who is one of the three plaintiffs. The other plaintiffs are Ramanand and his son S. Narain.

On the 14th December 1896 the second mortgagee brought a suit in the Court of the Subordinate Judge of Jaunpur upon their mortgages of the 19th February 1892 and the 20th May 1893 to obtain a decree for the principal moneys and interest due under the said mortgages, and they prayed that in default of payment on a date to be fixed by the Court, Arghupur should be sold by auction and the proceeds of the sale should be applied towards the satisfaction of their decree. To that suit the second mortgagees made Musammat Kamar-un-Nisa Bibi as one of the mortgagors and as the heiress of Musammat Niamat Bibi, then dead, the other mortgagor, Sarju Parshad, Ramanand and one Indar Sen Singh, defendants. Indar Sen Singh was a subsequent mortgagee; he is a defendant to this suit, but is not an appellant. In their plaint the second mortgagees stated that Sarju Parshad, Ramanand and Indar Sen Singh were mortgagees of Arghupur, and that they, the then plaintiffs, "were ready to pay the "mortgage money due to any of them who may be prior mortga-"gees and which they (the plaintiffs) may be legally bound to pay."

In their written statement in the suit of 1896, Sarju Parshad and Ramanand distinctly claimed their right as prior mortgagees and said, "If the plaintiffs be willing to get the hypothecated

"property sold, after paying in full the prior amount due to these "defendants, they have no objection whatever to the plaintiffs' "claim."

The then Subordinate Judge of Jaunpur, being obviously in confusion of mind as to the rights of the parties to the suit of 1896, by his judgment of the 19th January 1897, decided amongst other things that Arghupur should be sold by auction in the event of the defendants to the suit failing to pay, on or before the 19th May 1897, to the plaintiffs in that suit (the second mortgagees) Rs. 49,275-9-0, the principal and interest due under the mortgage of the 19th February 1892 and future interest, and that the proceeds of the sale should be applied first in payment of the amount due to the second mortgagees under their mortgage of the 19th February 1892, and that the balance, if any, should be "applied in payment of the sum which may be due to Sarju "Parshad and Ramanand on that date with interest. Any "surplus left to be applied in payment of the sum due to the "plaintiffs under the second document, dated the 28th May "1893." The Subordinate Judge apparently overlooked the rights of Sarju Parshad and Ramanand under their prior mortgage of the 8th August 1887. In accordance with the Judgment a decree was made by the Subordinate Judge. Default having been made in payment on the date fixed a decree absolute for sale of Arghupur was made by the Subordinate Judge of Jaunpur on the 4th September 1897. Under the decree of the 4th September 1897, Arghupur was sold. The proceeds of the sale were applied first in payment to the second mortgagees of the sum then due to them in respect of their mortgage of the 19th February 1892, and the balance of the proceeds of the sale was paid to the first mortgagees; that balance did not satisfy the amount then due to the first mortgagees under their mortgage of the 8th August 1887. If the proceeds of the sale of Arghupur had been first applied to the payment of the amount then due under the mortgage of the 8th August 1887, that mortgage would have been satisfied, and the amount due under the mortgage of the 25th June 1892 would have been to that extent reduced. As the proceeds of the sale of Arghupur did not satisfy the amount due to the second mortgagees under their mortgage of the 20th May 1893, they obtained a decree under S. 90 of the Transfer of Property

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Act, 1882, and in execution of this decree the village of Baragaon was sold on the 20th April 1904, and was purchased by the appellants.

On behalf of the appellants it has been contended before this Board and in the Courts below that Baragaon was relieved of all liability in respect of the debt due under the mortgage of the 8th August 1887, by reason of the failure of Sarju Parshad and Ramanand to insist on their priority under that mortgage, it being alleged in support of the contention that Sarju Parshad and Ramanand had agreed to waive their priority as mortgagees of Arghupur, or had waived it, of which, if it were material, there is no proof, and that they were guilty of laches in not insisting on that priority. Their Lordships have found it difficult to follow the argument in support of the contention, as the appellants had no interest in Baragaon until they purchased Baragaon on the 20th April 1904, and what they then purchased was the interest of the mortgagors in that village.

It is true that had Sarju Parshad and Ramanand appealed against the decree of the Subordinate Judge, they could have had their interests as first mortgagees under the mortgage of 8th August 1887 protected, and would, on the sale of Arghupur, have obtained payment of the amount then due under that mortgage. Sarju Parshad and Ramanand did not, by an appeal, insist on their right as prior mortgagees, but the fact that they did not insist on having the amount due under the mortgage of the 8th August 1887 satisfied in priority to the claim of the second mortgagees does not disentitle the plaintiffs to recover the full amount of their claim in this suit, and does not entitle the appellants to relief. No other fact which would entitle the appellants to relief has been shown. The appeals fail.

Their Lordships will humbly advise His Majesty that these consolidated appeals should be dismissed.

The appellants must pay the costs.

Solicitor for appellants: *Douglas Grant.*

Solicitors for respondents: *Barrow, Rogers and Nevill.*

PRIVY COUNCIL.

Present:—Lord Shaw, Sir George Farwell, Sir John Edge and Mr. Ameer Ali.

[On Appeal from the High Court at Allahabad.]

Rajwant Prasad Pande and others ... *Appellants.* *

v.

Mahant Ram Ratan Gir and others ... *Respondents.*

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Rajwant Prasad Pande *v.* Mahant Ram Ratan Gir.

Joint Hindu family—Manager—Mortgage-suit—Decree—Set aside against some—Insufficient service—Another suit—Two decrees—Merger—S. 108 *of C.P.C. of* 1882*—Suit to set aside decree—Fraud.*

In 1884 one Prag Dat Pande, the manager of a joint Hindu family executed a mortgage of certain family property. In 1897 the mortgagee brought a suit for the enforcement of his mortgage against *inter alia,* two sons of Prag Dat *viz.* Bhagwant and Rajwant, and a decree was passed *ex parte* on April 30, 1897 which was made absolute on September 22, 1900. In 1901 Bhagwant and his two sons obtained an order under S. 108 of Civil Procedure Code of 1882 by which the decree passed against them in 1897 was set aside on the ground of insufficient service, but it remained in force against Rajwant. On Sept. 22, 1902 a comprehensive decree was passed against Bhagwant and all others including Rajwant. Proceedings for execution were instituted in 1903 on the first decree of 1897. In 1906 when it was sought to make the decree of Sept. 1902 absolute, Rajwant objected to it and nevertheless the decree was made absolute. In a suit brought by Rajwant to set aside the decree on the same grounds

Held, that the only ground on which a decree could be set aside was fraud practised on the Court and in the absence of all averments of fraud, the action which was merely one for a declaration that a decree to which the plaintiff was a party and which he had allowed to become final did not apply to him was incompetent.

A challenge of the method of the exercise of the jurisdiction of a Court can never in law justify denial of the existence of such jurisdiction.

Appeal from a judgment and decree of the High Court at Allahabad, dated February 23, 1911 reversing a judgment and decree of the Subordinate Judge of Gorakhpore dated August 17, 1909.

One Prag Dat Pande and his two sons, Rajwant and Bhagwant and their sons constituted a joint Hindu family. Prag Dat was the manager of the property and in 1884 executed a deed of mortgage over the joint property in favor of the predecessor-in-title of the respondent. In 1897 the mortgagee instituted a suit against all the members of the joint family. This suit was heard *ex parte* and a decree given against all on April 30, 1897 and affirmed by the High Court in 1900. Prag Dut applied under

* 8th June 1915.

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S. 108 of Civil Procedure Code of 1882 to have the decree set aside but his application was rejected and the High Court upheld the rejection. Prag Dut then brought a suit to set aside the decree of April 1897 on the ground of fraud, but he failed both in the lower Court as well as in the High Court. In 1901 Bhagwant and his two sons made an application under S. 108 of Civil Procedure Code of 1882 to have the decree of April 30, 1897 set aside. This application was granted. Prag Dut applied to the Court for permission to defend the suit on his own behalf, but this was not granted to him and the High Court upheld the order of the lower Court. The case proceeded against Bhagwant and his sons *viz.*, and on September 22, 1902, a decree was passed against them and others as well as against the mortgaged property under S. 88 of the Transfer of Property Act, 1882. This was affirmed by the High Court in 1905. In 1906 an application was made for an order to make the decree of September 1902 absolute. To this Prag Dut Rajwant and his sons objected on the ground that the decree was made against them while they were not parties to the suit. The Subordinate Judge having disallowed their objection an appeal was unsuccessfully preferred to the High Court. They then brought a fresh suit in 1909 to have the decree of September 1902 set aside. The Subordinate Judge decided in their favor, but on appeal to the High Court his decision was reversed. An appeal was then preferred to the Judicial Committee of the Privy Council in due course.

Lowndes for the appellants contended that neither Prag Dut nor the appellants were parties to the retrial of the mortgage suit and the Court by which the same was heard had no jurisdiction upon such retrial to pass any decree against them. The decree of 1897 was now set aside and in consequence the decree of 1902, a second decree for the same cause of action could not stand. There could not be two decrees in respect of the same cause of action against the same person. A binding decree was passed against Prag Dut and the appellants on April 30, 1897 and an order absolute for sale of the mortgaged property was made on September 22, 1900 and therefore it was not competent to any Court to pass a second decree against them in respect of the same subject matter. The second decree is for a larger sum than the first decree and hence there could be no question of merger. How could the decrees merge into each other when they related

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to different sums and to different parties? Besides the decree of September 1902 was a preliminary decree; the appellants could take no steps till 1906. They never had any chance of appealing nor did they know of it till 1906. In September, 1902 they were not parties to the suit. Having regard to this fact there could be no execution against them. As the decree was according to judgment, the Court had to order execution of the decree which it could not amend, being according to judgment, but what would be the effect of execution was a different matter. It really ought to have refused execution, but it did not. The appellants could not appeal as they were not parties to the suit. Bringing a fresh suit was the only remedy.

Mr. Ameer Ali: They say as you did not appeal you have no right to bring a suit to set aside judgment. The contention is that you ought to have appealed to Privy Council and as you did not, you could not bring an action to have it set aside.)

(*Sir George Farwell*: Why did you not apply for leave to appeal?) The point was whether the issue on which decree was passed and in which the appellants were not parties would be binding upon them. They first asked to amend the decree and then not to execute it. The Court said that as decree stood against them, it must be executed. They then brought a suit to set aside the judgment. (*Sir George Farwell*: A judgment however enormous is an order of the Court and must be set aside by appeal only.) It was out of time and they had to come here and throw themselves at the clemency of the Crown and apply for leave to appeal. No appeal had ever been allowed here from the judgment of a Subordinate Judge.

Reference was made to *Gauri Sahai* v. *Ashfaq Husain* 1, *Rani Sundar Koer* v. *Rai Sham Krishen* 2 Ss. 109, 110 and 244 of C. P. C. of 1882.

De Gruyther, *K.C.* and *Dube* for the respondents contended that the decree was against all parties. If it was wrongly made against some, others who were parties to it had no right to appeal now.

[*Mr. Ameer Ali*:—If they do not proceed by appeal they have no right to proceed.]

1. (1911) L. R. 38 I. A. 37, 40. (I. L. R. 29 All. 623.)
2. (1906) L. R. 34 I. A. 9.

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There was an appeal from the decree but the High Court dismissed it in 1905. The decree passed in 1902 was not disputed till 1905. It was held that there was no fraud. This was the stage when the precise point raised now ought to have been raised. The case was re-opened and the decree was against all the members of the joint family. The appellants could not now re-open the order by a subsequent suit. It ought to have been done by appeal only.

Reference was made to *Mungul* v *Grija Kant Lahiri Chowdhri* [1], *Ram Kirpal* v. *Rup Kuari* [2], *Mulkarjun* v. *Narhari* [3], and *Gauri Sahai* v. *Ashfaq Hossein* [4].

Lowndes replied.

The judgment of their Lordships was delivered by

Lord Shaw:—This is an appeal from a decree of the 23rd February 1911, of the High Court of Judicature for the North-Western Provinces (Allahabad), which reversed a decree dated the 17th August 1909 of the Court of the Additional Subordinate Judge of Gorakhpur The court of first instance allowed the plaintiffs' claim. On appeal the claim was dismissed.

The object of the present suit is, by its terms, declared to be three-fold. But upon examination the substantial and only object is for a declaration in favour of the plaintiffs against the defendants to the effect that the plaintiffs are no party to a certain order which was passed *ex facie* against them on the 22nd September 1902. Further declarations are asked that the decree is ineffectual, and null and void against them, and so forth. In substance, as has been said, the object of the present suit is for a declaration that a decree pronounced by a court of competent jurisdiction on the 22nd September 1902, and bearing to apply to the present appellants, does not in fact apply to them.

The circumstances of the case are these. In 1884 Prag Dat Pande executed a mortgage over certain family property, of which he was himself manager, in favour of the predecessor in title of the respondents. He had two sons, Rajwant Prasad and Bhagwant Prasad. In 1897 a suit for sale under the mortgage, and directed against, *inter alios*, these three persons, was instituted. It was heard *ex parte* and on 30th April 1897 a decree was made

1. (1881) L. R. 8 I. A. 123.
2. (1883) L. R. 11 I. A. 37.
3. (1900) L. R. 27 I. A. 216 at 225.
4. (1911) L. R. 38 I. A. 87.

allowing the plaintiffs' claim. An order absolute was made on the 22nd September 1900.

In 1901, however (to put aside altogether the proceedings at the instance of Prag Dat, and to keep to the actual relevant challenges made in the course of these litigations) Bhagwant and his two sons obtained an order under S. 108 of the Code of Civil Procedure, 1882, to have the decree of the 30th April 1897 set aside, on the ground that there had been insufficient service upon them. It was found that the objection taken on the point of service was sound. The court in India was accordingly confronted with this situation, that in regard to a mortgage over a joint property a suit had been instituted and decree had been taken against all of the joint family, but that one member thereof had been properly served with the suit and another had not. A certain embarrassment arose in consequence and these proceedings, so protracted, ensued.

So far as Rajwant, the present appellant, was concerned, the original suit was found to have been properly initiated; and the summons properly served. The courts below adopted the view that the decree obtained in those circumstances was a decree practically final as regards Rajwant, and that with regard to the subsequent stages therein occasioned by Bhagwant's application, Rajwant had no right of compeering. Their Lordships are of opinion, however, that such questions, confusing as they appear, have no relation whatsoever to the point which is to be considered in this appeal.

On the 22nd September 1902 the Subordinate Judge delivered judgment, and he made another decree. Notwithstanding the decree which had already, as has been stated, been pronounced in April 1897, he granted a complete decree to the respondents in this appeal, against all the members of the joint family. The situation that thus arose was that in September 1902 a decree was comprehensively directed against all the joint family of which Rajwant, the appellant, was one member, Rajwant, however, being already bound by the decree which was passed in April 1897.

It would have been clear to the Board that there must have been, and could have been, no intention upon the part of the plaintiffs to put in operation the earlier decree of 1897; but the Board is surprised to observe that on the 23rd June 1903, namely, after the second and comprehensive decree had been obtained, an

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application was actually made for execution of the decree—not the second and comprehensive one of 1902—but the original decree of 1897.

Their Lordships think it right to record that in that application this statement was made :—

"In the beginning the name of Bhagwant Parshad also is entered as a defendant, but on his application this decree was set aside against him, and "consequently his name was not entered in the column of judgment debtors. "Another decree has been passed as against him. It will be executed separately."

Under those circumstances their Lordships are not surprised to find that in the year 1906, when an order was asked to make the decree of September 1902 absolute as against all the members of the joint family, the appellants took steps to have the situation cleared up. Accordingly, on the 7th July 1906, that application having been made, Rajwant preferred objections to it. Those objections, however, were disallowed, and the decree was made absolute by the Subordinate Judge on the 3rd November 1906. Their Lordships are clearly of opinion that in that suit each and all of the points stated upon this appeal were, or ought to have been, brought before the Court below. But if any doubt existed in their Lordships' minds on that topic it would be removed by a perusal of the terms of the judgments of the Subordinate Judge and of the High Court; because after the Subordinate Judge had made his order on the 3rd November 1906 the objectors, the present appellants, appealed to the High Court, and did so upon the same arguments as they now propone in support of the present appeal to this Board. The grounds of judgment of the High Court make it clear beyond all question that the very points which are now urged were points then taken. The objections were disallowed.

It is contended before their Lordships, however, that this matter cannot be dealt with as *res judicata*; that it is open to suitors in India, who have exhausted the remedies competent to them, and after final decree has been obtained against them, to institute a fresh suit or series of suits, the object of which is to declare that a decree competently and with adequate jurisdiction obtained therein, is not applicable to them, although they are named in that decree Their Lordships have no sympathy with this procedure. It is radically incompetent.

The objections can be stated *seriatim*. The objections that are now taken are, first, that the decree of 1897 has never been

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set aside, and that, accordingly, the later decree of 1902 cannot stand. The answer made is that the former has been impliedly set aside by the latter. The second objection is practically to the same effect. The matter of the second decree was *res judicata*, and, therefore, they are two decrees against the same Indian subject. The answer made to that, in the view of the High Court, is that there is a merger by the second decree of the first. The third objection is that the latter decree is for a definite sum of money, larger than the sum of money contained in the former. The answer is that, the interest accounts for the difference, and, secondly, that the doctrine of merger also applies.

Their Lordships are of opinion that upon none of those points ought they to make a pronouncement in this case. The judgment of the court below has been particularly canvassed on the doctrine of merger, as there treated. Their Lordships desire to make it clear that in the judgment now given no affirmance is given of the doctrine or application in the High Court of merger, either in a general sense or in the sense of a *vox signata*. The decree of the 26th February 1908, sufficiently covers each and all of the points which have just been enumerated. The case under which these objections were brought forward was competently before the court; it had jurisdiction to entertain them.

It is said that the court below decided the objections wrongly, and that the decree was erroneous. Their Lordships think it is very trite and very familiar that a challenge of the method of the exercise of the jurisdiction of a court can never in law justify a denial of the existence of such jurisdiction. The former has reference to the merits of the case, and the merits of the case have been in all points directly and substantially determined between the same parties as are now in contention at their Lordships' Bar. The familiar principle is laid down in a series of cases, of which the judgment of Lord Hobhouse in *Malkarjun Bin Shidramappa* v. *Narhari Bin Shivappa and another* [1] is not a very remote example. Their Lordships cannot countenance the laying aside of all that has happpened in previous litigations, the allowing of a process to become final, and the institution of a fresh suit, the object of which is to declare that, although in terms it was applicable to a particular subject of the King who was a party to the proceedings, still, upon a new application to Courts of Justice, a

1. (1900) L. R. 27 I. A. 216: I. L. R. 25 B. 337.

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different result should be reached, and it should be decided that the proceedings and decree did not apply to him.

This suit, in their Lordships' judgment, is equivalent to a suit for the rescission and destruction of a former decree of a competent Court. That rescission and destruction could be obtained on the ground of fraud "practised on the Courts below"; but fraud has been eliminated from this case. And accordingly these proceedings are, in their Lordships' judgment, a mere colour for a fresh suit on matters already competently settled by law.

Their Lordships will humbly advise His Majesty that the appeal should be dismissed with costs.

Solicitor for appellants: *Douglas Grant.*

Solicitors for respondents: *Barrow, Rogers and Nevill.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Seshagiri Aiyar and Mr. Justice Napier.

P. M. A. Velliappa Chettiar and another. *Appellants (Respondents-Decree-holders)*

v.

S. N. Subramaniam Chetty ... *Respondent (Petitioner).*

Velliappa Chettiar v. Subramaniam Chetty.

Civil Rules of Practice (Madras) R. 161 *A—Aim and nature of—Violation of the rule does not render proceedings after 6 months void* ab initio—*Decree transmitted to a District Court for execution—District Court sending it to a Subordinate Court—Does not give further period of* 6 *months for execution.*

The aim of rule 161 A. of the Civil Rules of Practice is to compel the decree-holder to make prompt steps to enforce the decree. The rule is in the nature of an instruction or direction to the Court to return the papers to the transmitting Court if no steps are taken by the decree-holder within 6 months to execute the decree.

A violation of this rule does not render the proceedings taken after the 6 months void *ab initio.*

Where a decree is transmitted to a District Court for execution and the District Court sends it to a Subordinate Court, the decree holder will not have a further period of 6 months from the date of the District Court transfering the decree for execution to the Subordinate Court.

Appeal against the order of the District Court of Ramnad at Madura dated the 25th day of September 1913, in O. P. No. 249 of 1913 (E. P. No. 179 of 1913 on the file of the Subordinate

161 A. If, after a decree has been sent to another court for execution, the decree-holder does not, within six months from the date of the transfer, apply for the execution thereof, the court to which the decree has been sent shall certify the fact that no application for execution has been made to the court which passed decree and shall return the decree to that court.

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* A. A. O. No. 45 of 1914. 10th March 1915.

Judge of Ramnad, in O. S. No. 467 of 1909, on the file of the High Court of Judicature at Fort William in Bengal).

Velliappa Chettiar v. Subramaniam Chetty.

A. Krishnaswami Aiyar for appellant.

A. Venkatarayaliah for the respondents.

The Court delivered the following

Judgment :—The appellants obtained a decree for money against the respondent in the Calcutta High Court. As the respondent was residing within the jurisdiction of the Subordinate Judge's Court of Ramnad, the decree was transmitted on the 2nd of September 1912, under the latter portion of O. XXI R. 5, to the District Court of Ramnad for execution. This latter Court sent the decree to the Subordinate Judge. An application for execution was made to him on the 22nd of April 1913, and certain properties were attached. While the application was pending in the Sub-Court, the respondent moved the District Court to call up the records from the Sub-Court on the ground that under R. 161-A of the Civil Rules of Practice, the proceedings taken in execution were void as they were instituted more than six months after the transmission of the decree by the Calcutta High Court. The District Judge upheld this contention and ordered "that the decree will be recalled from the Sub-Court and returned to the High Court of Calcutta." The present appeal has been presented against this order.

Mr. Krishnaswami Iyer has argued a number of points against the view of the District Judge. He contended that there will be a further period of six months from the date of the District Court transferring the decree for execution to the Sub-Court. This is obviously untenable. He next contended that the District Judge had no power to recall the decree from the Subordinate Judge. S. 24, Cl. (1) (b) is comprehensive enough to enable the District Court to withdraw a transmitted execution proceeding to its own file and to dispose of it. The learned vakil has also argued that the exceeding of the time limit does not render the proceedings infructuous.

The aim of the rule is to compel the decree-holder to take prompt steps to enforce the decree. The rule is in the nature of an instruction or direction to the Court to return the papers to the transmitting court if no steps were taken by the decree-holder

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within 6 months to execute the decree. A violation of this rule does not render the proceedings taken void *ab initio*. In such cases, time is not of the essence of the stipulation. Mr. Justice Denman points out in *Caldow* v. *Pixell* [1]. "The cases cited before us establish that, where a public officer is directed by a statute to perform a duty within a specified time, the provisions as to time are only directory, and also that in considering whether a statute is imperative, a balance may be struck between the inconvenience of rigidly adhering to, and the inconvenience of sometimes departing from its terms." Mr. Justice Lopes says that in deciding whether a rule is mandatory or directory the possibility of justice suffering from a too rigid application of the time limit should be taken into account. In *The Queen* v. *Ingall* [2], both Mellor and Lush, JJ., enunciate the same principle. Reference may also be made to *Brumfitt* v. *Bremner* [3] and the *Queen* v. *Lofthouse* [4]. We think the reason underlying these pronouncements is applicable to the present case. The effect of holding that the Sub-Court was *functus officio* after six months and that the proceedings in execution are a nullity would be to allow the judgment-debtor to escape the liability which the law subjects him to. The rule in question is not an adjunct to the Code of Civil Procedure. It is a rule of convenience issued by the High Court with the object of inducing decree-holders to take early steps to execute their decrees. Although S. 148 of the Code of Civil Procedure may not apply in terms to the present case, its analogy may be utilised for the purpose of showing that the legislature regards such provision as directory in their nature and not mandatory.

We must reverse the order of the District Judge and direct him to return the records to the Sub-Court to enable the appellants to execute the decree under the process already issued.

Appellants are entitled to their costs in this Court.

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1. (1877) 2 C. P. D. 562.
2. (1876) 2 Q. B D. 199.
3. (1861) 9 C. B. N. 81.
4. (1866) L. R. I. Q. B. 433.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Ayling and Mr. Justice Hannay.

Rambilas and others ... Petitioners * (Accused).

Rambilas *In re*

Criminal Procedure Code, Ss. 179, 181—Applicability—Criminal Breach of Trust—Essentials of offence—Breach of trust by dishonest use or disposal of property in violation of contract—Jurisdiction—Magistrate.

The offence of Criminal Breach of Trust is completed (assuming a preliminary trust) by the misappropriation or conversion of the property dishonestly, *i.e.*, with the intention of causing wrongful gain or wrongful loss. It is only the intention which is essential. Whether wrongful gain or loss actually results is immaterial, it is a consequence, but no essential part of the offence, and a person is not accused of the offence by reason of it.

Where the accused, alleged to be brokers carrying on business in the Bombay Presidency, were charged in two cases on the file of the Sub-Divisional Magistrate at Erode, with the offence of Criminal Breach of Trust in respect of the proceeds of certain hundies entrusted to them for encashment by the complainants, merchants at Dharapuram in the Erode Sub-Division, and it was found that the hundies were received and cashed by the accused in Bombay and that the cash proceeds were retained and misappropriated there, *held* that the Erode Sub-Divisional Magistrate had no jurisdiction to try the cases.

The offence of Criminal Breach of Trust by reason of dishonest use or disposal of property in violation of contract is committed where the dishonest use or disposal takes place—not where the contract was made or should have been performed. *The Assistant Sessions Judge of N. Arcot* v. *Ramasami Asari* 1, dissented from.

Petition under Ss. 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the order of the Sub-Divisional 1st Class Magistrate of Erode in C. C. No. 110 of 1913 and 3 of 1914.

S. Swaminathan for the accused.

Public Prosecutor for the Crown.

The Court made the following

Order:—The petitioners who are stated to be brokers carrying on business in the Bombay Presidency are accused in two cases on the file of the Sub-Divisional Magistrate at Erode. The complaint against them is that they committed Criminal Breach of Trust in respect of the proceeds of certain hundies entrusted to them for encashment by the complainants, merchants of Dharapuram in the Erode Sub-Division.

* Cr. R. C. 326 of 1914. Cr. R. P. 279 of 1914. 21st October, 1914.

1. (1914) 26 M. L. J. 285.

Rambilas
In re

The question is whether the Erode Sub-Divisional Magistrate has jurisdiction to try the cases.

From the recitals in the complaint, it is clear that the hundies were received and cashed by the accused (petitioners) in Bombay and that the cash proceeds were retained and misappropriated there.

It is conceded in the course of the hearing before us that the accused have been, and still are residing outside this presidency; so that S. 185 of the Criminal Procedure Code, does not apply.

The Sub-Divisional Magistrate has held the cases to fall within his jurisdiction in virtue of S. 179 of the Criminal Procedure Code on the ground that the wrongful loss occasioned by accused's acts accrued to complainants at their residence and place of business, Dharapuram.

We have carefully considered the effect of S. 179 of the Criminal Procedure Code read with S. 405 of the Indian Penal Code : and are clearly of opinion that it cannot be interpreted as giving jurisdiction to the Erode Sub-Divisional Magistrate to try the present cases. The offence of Criminal Breach of trust is completed (assuming a preliminary trust) by the misappropriation or conversion of the property (in this case the cash proceeds of the hundies) dishonestly, *i. e.*, with the intention of causing wrongful gain or wrongful loss. It is only the intention which is essential. Whether wrongful gain or loss actually results is immaterial, it is a consequence, but no essential part of the offence, and a person is not accused of the offence by reason of it. The learned Public Prosecutor has drawn our attention to the second part of S. 405 which deals with dishonest use or disposal of property in violation of law or contract. He says accused had contracted by letters received at Dharapuram to remit the amount to the complainants there; and argues that the contract was broken by failure to deliver the money at Dharapuram, and that this fact gives jurisdiction to the Erode Court. We are unable to follow this reasoning. In the first place the present case falls under the first, and not the second, part of the section: the complaint clearly charges dishonest misappropriation to accuseds' own use and not to use or disposal in violation of law or contract. Secondly, if it were otherwise, the offence would be committed where the dishonest use or disposal took place—not where the contract was made or should have been performed.

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No authority has been quoted in support of this last argument; but the Sub-Divisional Magistrate has based his decision on two rulings of the Allahabad High Court, *Queen-Empress* v. *O'Brien* [1] and *Emperor* v. *Mahadeo* [2]. These cases are undoubtedly in point; and afford some authority in support of his view. We observe that in the first case the court was proceeding under S. 185 of the Criminal Procedure Code, and appears to have been influenced to some extent by considerations of convenience. The second case was decided by a single Judge, who was disposing of a revision petition against a conviction. In declining to interfere, he quoted in *Queen-Empress* v. *O'Brien*[1] and was prepared to follow it, but he also relied on S. 182 of the Criminal Procedure Code as giving jurisdiction, and, further, on S 531 of the Criminal Procedure Code as justifying his refusal. This decision certainly adds nothing to the earlier one; and, if the latter is to be taken as an expression of opinion on the strict interpretation of S. 179 then with all respect we are unable to follow it.

In a later case, *Ganesh Lal* v. *Nand Kishore* [3], another learned Judge of the same Court, Karamat Husain, J. while distinguishing *Queen-Empress* v. *O'Brien*[1] on the facts, discussed the meaning of S. 179 of the Criminal Procedure Code in relation to a similar case to the present one and expressed exactly the same view as we are inclined to adopt. In a still latter case *Langridge* v. *Atkins* [4] another learned Judge (Mohamed Rafiq, J.,) elected to follow *Queen-Empress* v. *O'Brien*[1] but did not discuss the point apart from the rulings thereupon.

The only case of this Court to which we are referred, is that of *The Assistant Sessions Judge of N. Arcot* v. *Ramasami Asari* [5]. This arose out of an application to quash a commitment: and the main point for determination was the applicability of S. 188 of the Criminal Procedure Code, and the necessity of a certificate from the Political Agent. Spencer, J., remarked that the loss occasioned by the breach of trust in that case was a "consequence" within the meaning of S. 179 of the Criminal Procedure Code, sufficient to give jurisdiction, and quoted *Queen-Empress* v. *O' Brien*[1] and *Langride* v. *Atkins*[4] as authority. But the bulk of the judgment of both the learned Judges was devoted to the effect

1. (1896) I. L. R. 19 A. 111.
2. (1910) I. L. R. 32 A. 397.
3. (1912) I. L. R. 34 A. 487.
4. (1912) I. L. R. 35 A. 29.
5. (1914) 26 M. L. J. 225.

Rambilas *In re*

of the want of a certificate: and with all respect we do not feel compelled to treat this as a considered ruling on the point binding upon us.

These are all the cases to which we are referred: and we do not think their effect would justify our adopting a different interpretation of S. 179 of the Criminal Procedure Code and S. 405 of the Indian Penal Code, to that which a careful consideration of the sections themselves seems to indicate.

We set aside the order of the Sub-Divisional Magistrate and direct the discharge of the petitioners.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Oldfield and Mr. Justice Napier.

Krishnamachari ... *Accused in Calendar Case No. 17598 of 1914 of the Court of the third Presidency Magistrate of George Town.*

v.

Messrs Shaw Wallace and Co. *Complainants.*

Krishnamachari *v.* Shaw Wallace and Co.

Criminal Procedure Code, Ss. 179, 181—Applicability—Criminal Breach of Trust—Magistrate—Jurisdiction.

Where the complainant, a firm with headquarters at Madras, charged the accused, alleged to have been appointed agent for the sale of the complainant's oil at Nandyal, with offences under Ss 406 and 409 of the Penal Code, in that the accused misappropriated the money realised by sale of the oil, failed to account to the complainant when called upon to do so, and left Nandyal after locking up his place of business and secreting his account books, *held*, that the case fell under S. 181 of the Code, and the third Presidency Magistrate of Madras, in whose Court the complaint was instituted, had no jurisdiction to try the offence and that the secondary loss at Madras of the complainant's firm would not give the Magistrate jurisdiction.

Per Oldfield, J.—The ensuing of loss quite as much as the existence of dishonest intention is an essential element in the offence of Criminal breach of trust. S. 179 of the Criminal Procedure Code can be applied only to cases in which the consequence necessary to constitute the offence ensues in some place other than that in which the accused's act is done.

Case referred for the orders of the High Court, under S. 438 of the Criminal Procedure Code by the Third Presidency Magistrate, Georgetown in his letter R. O. C. No. 132 of 1915, dated 8th March 1915.

* Crl Rev. Case 168 of 1915. 9th April 1915.

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Oldfield, J.

The Crown Prosecutor (J. C. Adam) on behalf of the Government.

T. Richmond, Counsel for the complainants.

R. N. Aiyangar, Counsel for the accused.

The Court made the following

Order :—*Oldfield, J.* :—The question on this reference is whether the Third Presidency Magistrate has jurisdiction to try the accused for an offence punishable under S. 406 or 409 of the Indian Penal Code, or whether he should return the complaint for presentation to a competent Court at Nandyal, Kurnool District.

The circumstances are set out in the complaint only generally. But the material allegations appear from the evidence already taken and the statements of complainant's counsel to be that the accused was appointed agent for the sale of the complainant's oil at Nandyal, that his periodical reports showed a certain quantity of oil sold and a certain sum of money received and (after deduction of commission, etc.) to be accounted for and that, when called on to account the accused failed to do so, leaving Nandyal after locking up his place of business and secreting his books, the inference being that he had made away with the funds in his charge. No suggestion is made that any oil entrusted to him has been converted to his use or dealt with otherwise than in accordance with complainant's instructions; that is, by sale to customers. The misappropriation relied on is accordingly not of the oil, but only of the money received for it; and we can therefore dismiss from consideration what seems to have been thought material before the Magistrate, the allegations as to the origin of the oil, whether it came from Madras or Cocanada. The fact that the accused was appointed agent by an order sent from Madras is also without significance in a Criminal case. The only ground, which we have to consider, as justifying the jurisdiction of the Madras Court, is that the loss ensued there to the complainant's firm, as a consequence of the accused's conduct at Nandyal and that the case is therefore covered by S. 179, Criminal Procedure Code, not by S. 181 only, in which offences under Ss 406 and 409 are specially dealt with. In accordance with the ordinary cannons of construction the special provision should ordinarily receive effect unqualified by the general. Clear reason must therefore be shown

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in the wording of S. 179 or otherwise before the complainant's contention can be accepted.

That contention has been endorsed and negatived in different decisions; but, though in some of them attempts have been made to state the principle applicable in more or less general terms, the weight of such statements is impaired by the facts that either the allegations before the Court and the exact relations between the parties are not stated fully in the reports or the conclusion may have been influenced by uncertainty regarding the place, in which the money or property concerned was received or converted by the accused. *Rajani Binod* v. *All India Banking Company* [1] is an instance of the former class of cases, and *Langridge* v. *Atkins* [2] of the latter.

In this Presidency *Ramasami Asari's case* [3] no doubt supports both the propositions which the prosecution has to establish, that (1) the offence is constituted by the accused's dishonest conversion and the loss, which ensued as its consequence, and (2) such loss ensues, not only where and when the conversion takes place, but also where the complainant ordinarily receives the accused's accounts and remittances. In the case of *Rambilas* [4] however two other learned Judges did not feel compelled to treat this as a considered ruling on the point; and with all due deference we follow them so far. Their decision however negatived the first of the propositions above stated on the ground that the existence of dishonest intention, not the ensuing of loss, was the essential element in the offence of criminal breach of trust and that there was therefore no question of any consequence or of the application of S. 179; and we respectfully dissent from this view. For, we are unable to conceive and the learned Counsel has been unable to suggest any case, in which more than mere preparation or attempt could be held established, but no loss whatever, it may be only a temporary or highly insignificant one, could be found to have been caused. Our conclusion is in fact that the loss ensues immediately on the conversion because by it the property of the principal, entrusted to the agent, is diminished in the latter's hands. It is the complainant firm's case that accused's collections (less commission) belonged to it from the date of receipt, and it is not alleged that any

1. (1913) 22 I. C. 192.
2. (1912) I. L. R. 35 A. 29.
3. (1914) 26 M. L. J. 235.
4. (1914) 29 M. L. J. 175.

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appropriation was necessary to change their ownership. The date of conversion may be uncertain and susceptible of no more definite statement than as prior to the proper date for remittance. That however cannot alter the fact that the firm's funds in Nandyal were diminished. It follows that primarily at least it suffered wrongful loss there.

Complainant's second proposition stated above is clearly essential to his contention. For S. 169 can be applied only to cases, in which the consequence, necessary to constitute the offence, ensues in some place other than that, in which the accused's act is done. It has been supported with reference to the present case on the ground that, although the firm's loss at Nandyal may have been a primary consequence, the loss at Madras, the firm's head-quarters where its funds are kept, was a secondary one and was sufficient to attract the operation of the section. This distinction is not recognised explicitly in the majority of the cases relied on before us, perhaps because, as already observed, the place where loss was primarily sustained was uncertain. But it is referred to in *Langridge* v. *Atkins*[1] as the foundation of the decision in *Ganesh Lal* v. *Nand Kishori* [2] on which the accused relies; and it was not drawn in the former case, because the averments in the complaint did not support it. Its validity was moreover endorsed directly in *Sirdar Meru* v. *Jethabai* [3] where the act in question was a complete causing of grievous hurt and it was held that complainant's consequent incapacity for the statutory period in another jurisdiction would not effect the venue. We follow these authorities and hold that the complainant's firm's secondary loss at Madras will not give the Third Presidency Magistrate Jurisdiction. He must return the complaint for presentation to a competent Magistrate having jurisdiction over Nandyal.

Napier J. :—I concur.

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1. (1913) I. L. R. 35 A. 29. 2. (1912) I. L. R. 34 A. 487.
3. (1906) 8 Bom. L. R. 513.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Mr. Justice Oldfield and Mr. Justice Tyabji.

Chennama Shettithi and others ... *Appellants* * (*Defendants Nos. 1 to 16.*)

v.

Krishnayya Setti and others ... *Respondents* (*Plaintiffs and Defendants.*)

Chennama Shettithi *v.* Krishnayya Setti

Civil Procedure Code of 1908—O 41, R. 22—Memo of objections—Time for filing—Calculation—Principle.

The period of one month allowed by O. 41, R. 22, of the Code to a respondent for filing a memo of objections after the date on which notice of the appeal is served upon him must be taken to extend up to and including the day before the corresponding date of the next month.

Where therefore a memo of objection was presented on the 16th March by a respondent who had been served with notice on the 13th February, *held,* that the memo was presented out of time.

Second Appeal from the decree of the Court of the Subordinate Judge of South Canara in A. S. No. 33 of 1913 preferred against the decree of the Court of the District Munsif of Coondapoor in O. S. No. 657 of 1909.

B. Sitarama Rao and *K. Y. Adiga* for Appellant.

K. P. Lakshman Rao for *K. Sundara Rao* for the Respondents

With regard to the memorandum of objections the Court delivered the following

Judgment: The Memorandum of objections was presented on the 16th March the plaintiffs having been served with notice on the 13th February. The principle applicable to the calculation of the time, one month allowed by Order XLI, R. 22, is that it shall be taken to extend up to and including the day before the corresponding date of the next month and we have not been shown authority for any special rule as regards February—March. Although therefore the 15th March was Sunday, the memorandum was presented out of time and must be dismissed with costs.

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* S. A. No. 2546 o 1913. 24th November 1913.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

FULL BENCH.

Present:—Sir John Wallis, Chief Justice, Mr. Justice Sadasiva Aiyar and Mr. Justice Srinivasa Iyengar.

Edward Charles Dawson ... *Petitioners* (Plaintiffs.)*

v.

Matty Dawson ... *Respondent-(Defendants.)*

Divorce Act (IV of 1869) S. 20—Suit for declaration of nullity of marriage—Impotency—Pleadings—Proof.

Dawson v. Dawson.

A decree declaring a marriage null and void on the ground of impotence on the part of one of the parties is unsustainable in the absence of an express allegation that the party was impotent, *i e*, physically unfit for consummation both at the date of marriage and at the date of the institution of the suit, and strict proof of the same.

Case stated under S. 20, Act IV 1869 by the District Judge of Bellary in O. S. 42 of 1914, for the confirmation of the decree *nisi* passed by him in the said suit by the High Court.

Zacheus for the Petitioner.

The Court delivered the following

Judgment:—In order to support a suit for nullity of marriage in this country on the ground of impotence on the part of one of the parties, such impotence must of course be proved, or there must be facts from which impotence, that is, physical unfitness for consummation may be inferred both at the date of the marriage and at the date of the institution of the suit. The only evidence here is that the respondent never attained puberty, and that the petitioner never had intercourse with her. Nor are the allegations in the plaint any more satisfactory. In the circumstances, we think it best not to confirm the decree and to dismiss the suit with liberty to bring a fresh suit as the whole nature of the proceedings appears to have been misconceived.

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* Ref. Case No. 2 of 1915. 3rd August 1915.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Oldfield and Mr. Justice Tyabji.

Sankara Venkataratnam and others ... *Appellants.** (*Defendants.*)

v.

Sri Rajah Varadarajah Appa Rao Bahadur, Zamindar Varu *Respondent* (*Plaintiff.*)

Sankara Venkataratnam *v.* Sri Rajah Varadarajah Appa Rao. — Oldfield, J.

Estates Land Act, S. 3 sub-s. 7 (1)—Old waste—Period of not less than 10 years—Need not precede the letting—S. 153, 157, 163—Tenant of old waste—One year's lease given before the Act—Ejectment on the ground of—Expiry of the lease—Maintainability of—Revenue Court or Civil Court-Jurisdiction.

The period of ten years referred to in the definition of old waste in S. 3, sub-sec. 7 cl. (1) Estates Land Act need not immediately precede the letting in question, but may precede some prior letting within 20 years before the passing of the Act.

Per Oldfield, J:—An action in ejectment may be brought in the Revenue Courts against a tenant of old waste holding under a year's lease given before the Act merely on the ground that the lease has expired and the plaintiff has not consented to his holding over

Per Tyabji, J.:—Such an action will lie only in the Civil Court.

Second appeal from the decree of the District Court of Kistna at Masulipatam, in A. S. Nos. 491 and 516 of 1912, preferred against the decree of the Court of the Head Assistant Collector of Bezvada Division, in Summary Suit No. 9 of 1910.

V. Ramadoss for the appellants.

P. Nagabushanam for the respondents.

The Court delivered the following

Judgment:—*Oldfield, J.*:—The suit was brought under the Estates Land Act by a landlord to eject a tenant, and the first point raised is whether the land should have been treated as "old waste" by the Lower Courts. Defendants argue that it should not have been on the ground that the period of not less than ten years referred to in S. 3 (7) (1) must immediately precede the letting, under which the tenant entered, and not (as is here the case) some other letting within twenty years before the passing of the Act. We agree with the learned District Judge that this is unsound. Nothing in the wording of the provision supports such a construction. Its adoption would entail the substitution for the words "at the time of letting" of some such expression as "immediately before the letting to the ryot in possession" for which there is no warrant. We can see neither reason nor convenience in favour of the view that the character of "old waste" can be lost in consequence of the interposition of a tenancy, during

* S. A. No. 94 of 1914. 21st December, 1914.

which nothing to impair that character is done by the tenant. We therefore proceed on the basis that the suit land is "old waste".

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It is then argued first that the plaintiff is not entitled to eject in consequence of the expiration of the defendant's tenancy by efflux of time with reference to Ss. 153 and 157, on the sole ground that, the facts being admitted, the expiration of a tenancy like this, of less than five years' duration is not one of the grounds referred to in the former and the reservation in the latter of "any contract to the contrary" debars plaintiff from relying on the reference to expiry of term in the addition to S. 153 made by Act IV of 1909. This has been supported with reference to *Achayapparaju v. Krishnamayachendralu* [1]. But the decision was doubted by one of the learned Judges responsible for *Ponnusami Padayachi v. Karuppudayan* [2], and not relied on by the other. And on the merits it is not clear how the existence of "any contract to the contrary can be material in this connection, when it is the expiration of a contract which is relied on, or how S. 157 can be given this interpretation without depriving the addition to S. 158 of effect. It is urged that it will still have effect with reference to S. 153 (*a*). But, if that alone had been the intention, it would naturally have been carried out by the insertion of the words extending the operation of the clause to leases granted before the commencement of the Act and the general wording of the addition would have been avoided.

S. 9 is moreover relied on and no doubt it is not qualified expressly by the addition to S. 153, though the latter is of course one of the provisions of the Act referred to in it. It is argued that the effect of Ss. 9, 153, (as amended) and 157 is at most to save an existing liability to ejectment in the case of lessees for less than five years independently of the Act, not to create a new one, or sanction an existing one under it. But the question is then mainly one of jurisdiction. For defendant's argument would entail only that the suit to enforce such independent liability would lie in the Civil, not the Revenue Court, not that it should be dismissed, and that the plaint should be returned. That was the basis on which a similar contention was considered in the second case above cited; the circumstances being very similar to those before us, and one learned Judge holding that the Civil Court was the proper tribunal. Two answers have been attempted

1. (1913) 24 M. L. J. 402. 2. (1914) 26 M. L. J. 285.

Sankara Venkataratnam v. Sri Rajah Varadarajah Appa Rao.

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to the argument. First, that the question, regarded as one of jurisdiction is closed because in this case the plaint was originally returned by the Court of First Instance and the Lower Appellate Court set aside the order of return on appeal; its decision being final under S. 105 of the Code of Civil Procedure. Secondly, that the Revenue Court has in fact jurisdiction; the decision in the case relied on being erroneous.

As regards the first of these answers, it is sufficient that the question is one of jurisdiction and that the Appellate Court's order not being one of remand is appealable and, if the objection on the merits is well founded, involving an error affecting the decision, can be attacked in Second Appeal. No other view could be taken consistently with the authorities, such as *Babaji* v. *Lakshmibai* [1] and *Vydinatha* v. *Subramanya* [2] in which an objection was allowed to the jurisdiction in second appeal, after it had been taken unsuccessfully in the Courts below. For it cannot be material that it was once sustained and afterwards disallowed.

Then on the merits and with reference to the decision in *Ponnusami Padayachi* v. *Karuppudayan* [3], it is to be observed that the question of jurisdiction was dealt with on the basis referred to by one only of the learned Judges; and the correctness of this decision is therefore open to respectful consideration. It was that ryots, such as defendants, who remain in possession of old waste, but have paid no rent, after the expiration of a lease for less than five years are liable to ejectment by Civil Court's decree under S. 163, as trespassers, inasmuch as they have not been admitted as ryots by the landholder or in effect that their original admission as lessees is immaterial, since there has been a break in the continuity of their relation with the landholder, and a second admission is necessary to revive it and exclude them from the operation of the section. With all deference, this is not involved by the provisions and authority referred to. The explanation to S. 6 of the Act applies only to occupation of ryoti land other than old waste and deals only with the result of acceptance of payments made under S. 45, and therefore not after any previous tenancy. S. 116 of Transfer of Property Act merely recognises acceptance of rent as effecting a renewal of the previous lease, but does not specify that the tenant is "admitted"

1. (1884) I. L. R. 9 B. 266. 2. (1884) I.L.R. 8 M. 285.
3. (1914) 26 M. L. J. 285.

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in virtue of it. *Vedapalli Narasimham* v. *Dronamaraju Seetharama Murthi* [1], does not deal with the latter point. In fact, the retention of possession after the expiry of any tenancy would afford an immediate cause of action for such a suit as that before us.; and if S. 163 is to be applied, the absence from it of any saving of the right of the suit under S. 153 (*e*) requires explanation. The former section occurs under the heading the "eviction of tenants." But the only other case dealt with thereunder is that of a tenant of private land : and tenants of ryoti land have been dealt with (apparently exhaustively) under the heading "ejectment". The wording of S. 163 is in itself against the view that it is applicable to cases, in which the trespasser entered under a lease, since it applies only to "persons who occupy land otherwise than by inheritance or legal transfer", and the subsequent reference to S. 45 bears this out. In the circumstances the conclusion that it deals with persons, such as defendants, who have entered on "old waste" under a lease and have continued in possession cannot be accepted.

S. 163 failing, the question is whether in the absence of provision in the Act for ejectment suit in the case of leases for less than five years granted before it, such suits must still be brought in the Civil Courts or whether they are covered by the amended S. 153. The former alternative is inconsistent with the comprehensive character of the Act and its application of the Revenue jurisdiction in other similar circumstances and is, it will be shown, negatived by the wording of S. 153 itself. To the latter, the objection already stated that expiry of the lease is not specified in the section, except as a ground for ejectment unaffected by it, is relied on. This difficulty however disappears on a closer reading. The section deals exhaustively with ejectment of non-occupancy ryots as regards two matters. Firstly, it prescribes the Collector's Court as the tribunal for all ejectment suits against them, whatever the ground of liability to ejectment, and whether the grounds to be enumerated correspond with those available before the Act or not. Secondly, it enumerates the grounds available and, in doing so, by the addition to it maintains the ground of liability involved in the expiry of the term of a lease granted before the Act was passed. The point is that the addition deals with liability to ejectment, not the tribunal which is to enforce it.

1. (1908) I. L. R. 31 M. 163.

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The preceding provision for the Collector's jurisdiction is therefore unaffected, and the result is, notwithstanding the enumeration of grounds of liability, to save that, which would have arisen but for the act, on the expiry of leases granted before it and to make suits thereon cognisable by the Collector. The conclusion must therefore be that defendants are liable to ejectment and were sued in the Revenue Court rightly.

The remaining question raised by them is whether the suit for ejectment should have been proceeded with, when during its pendency they applied under S. 46 for purchase of the occupancy rights. No doubt persons entitled to apply under that section and persons liable to be sued under S. 153 are described alike as non-occupancy ryots. But it is not possible to treat that description as covering for the purpose of the former those, who are covered by the latter, and who are remaining in possession wrongfully after the landholder has taken steps to oust them. The explanation to sub-section 1 of S. 6 added by Act IV of 1909 has been relied on as recognising the rights of ryots actually in possession. But it is statedly restricted to the purpose of the sub-section and the section as a whole applies only to land other than "old waste". This argument also therefore fails.

The second appeal should therefore be dismissed with costs.

Tyabji, J.—This appeal arises out of a suit for ejectment and damages for wrongful possession.

The facts found are that the land in question was not cultivated before 1901 (fasli 1311). It was then for the first time leased out for cultivation during faslies 1311—1315 (1901-1905). Thereafter the defendant obtained a lease for the 3 years ending 30th June 1909. The plaint was filed on 3rd January 1910 for ejecting the defendant on the ground that he had refused to give possession though the lease had expired.

The questions that arise in this appeal fall under two main heads of substantive and adjective law respectively.

I. Whether the defendant has any right to remain in possession of the land in question; or, is the plaintiff entitled to have him evicted; and

II. If the defendant can be evicted at the instance of the plaintiff whether the Court that has jurisdiction to give a decree in ejectment is the Revenue or the Civil Court.

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As to the substantive rights of the parties, the defendant contended that the land is not old waste within the Madras Estates Land Act, S. 3 (7) (1) because though it remained uncultivated for such a period as is mentioned in the clause, yet that period did not immediately precede the letting to the defendant. The contention seems to me to be untenable. The wording of cl. (2) removes any doubt that might have otherwise existed. I agree therefore that the land falls under the description of old waste.

Next, it is argued as a matter of substantive law that, though the land be old waste, the defendant is entitled to remain in possession, after the expiry of his lease, without the landholder's assent. This result, it is contended, is brought about by the provisions of the Act, which restrict the landholder's right over the land by specifying the grounds on which alone he may have a person who is in possession ejected; these specified grounds, it is said, do not include the expiry of a lease.

The sections that are relied on for this contention are Ss. 9, 46, 152 and 157.

It seems to me that the argument is unsound for several reasons.

The sections in question do not affect the landholder's right to eject generally but only his right to eject (1) occupancy ryots; (2) non-occupancy ryots; and (3) tenants of old waste: the sections do not affect the landholders' right to evict trespassers. Subject to what I am going to say with reference to the terms of S. 153 (*e*) none of the three expressions can, it seems to me, include a person who *was* a tenant at some time prior to the point of time with reference to which his rights have to be determined. The word ryot is defined in S. 3 (15) by reference to there being a condition to pay rent. Can there be said to be any condition to pay rent between the landholder and a person whose lease has expired? After the expiration of the period during which the condition is agreed to be operative, the condition cannot be said to exist, the expression tenant is well recognised as a term of law. A person who has been a tenant and who holds over is no doubt described in English law as a tenant on sufference; but a tenancy on sufference is in fact no tenancy at all; *Barry* v. *Goodman* [1], mere holding over does not create a tenancy, in the absence of something to show that a new tenancy was implicitly

1. (1837) 2 M. & W. 768.

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created—some conduct from which it may be inferred that the landholder treated the person holding over as his tenant. Very little may no doubt be enough to convert a tenancy on sufference into an impiled tenancy on terms similar to the expired lease. But that little is wanting here.

For the same reasons it seems to me, that the defendant was not entitled to claim the benefit of S. 46 after the expiry of his lease and a ter he was no more a non-occupancy ryot, but was a person who having held land as a non-occupancy ryot continued in possession after the expiration of the term during which he was entitled to hold as a non-occupancy ryot. The explanation to S. 6 (1) applies to non-occupancy ryots of ryoti land other than old waste, and is not applicable here.

It seems to me therefore that the sections are *prima facie* and subject to what I am going to say intended to govern the relations of a landholder and his tenants during the continuance of the tenancy (whether the land consists of old waste, or other ryoti land in an estate : and whether the tenancy arises under a contract or by operation of law). They do not seem to me primarily to govern the relations of the owner of old waste and a person who holds over and between whom and the landholder there is no express or implied tenancy. To assume that Ss. 9, 46, 153 and 157 govern the relations between the parties now before us seems to me to beg the question. It is to assume that the defendant is a tenant when it has to be determined whether he can assert the rights of a tenant. This assumption seems to me to be connected with the suggestion rejected by Miller, J. *Ponnusami Padayachi* v. *Karappudayan* [1] that though neither the defendant nor any third person has the right of occupancy in the land, yet the landholder does not have that right ; that the landholder can only sue for ejectment on the basis that all persons other than himself have the right to the present possession of old waste on the same terms as a ryot has to the possession of ryoti land under S. 6 (1). If this were the correct view, in the first place the distinction between old waste and ryoti land in an estate, made in the last sentence of S. 3 (7) and in S. 6 (1) would be destroyed : a person who has come in as a tenant of waste land would acquire rights similar to occupancy rights, merely by not giving up possession. In the second place, it seems to me, that

1. (1914) 26 M.L.J. 285 at 287.

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the assumption is opposed to the second portion of S. 116 of the Indian Evidence Act.

Moreover the land-holder's right to eject on the expiry of a lease a person who has not acquired occupancy rights is specifically recognised in the last sentence of S. 153, which bears upon the questions both of substantive and adjective law, mentioned at the commencement of my judgment, and I will deal with it in detail.

S. 153 as I have already said, deals with the liabilities of a non-occupancy ryot and it can have no relevance if what I have said about the meaning of the terms "tenant of an old waste" and "non-occupancy ryot" is correct: a tenant of old waste being by S. 157 placed in the same position (with reference to the matter now in question) as a non-occupancy ryot. But a certain amount of doubt is cast on the view I have expressed by the fact that in clause (e) of S. 153 a person who has been admitted to occupation under a lease is apparently referred to as though even after the expiry of his lease he could be described as a " non-occupancy ryot". This inaccuracy of terms is avoided in the amending Act where the position of a ryot during the continuance of the tenancy is recognised as distinguishable from his position after his expiration: I refer to the explanation to S. 6 (1) and the addition to S. 153 by the amending Act: a quondum occupancy ryot of ryoti land who holds over is, by the former provision, placed in the same position as an occupancy ryot during the continuance of his tenancy; but the latter provision lays down that a quondum non-occupancy ryot (if the lease was granted before the commencement of the Act) is not in the same position (with reference to S. 153) as a non-occupancy ryot during the continuance of the tenancy except where the non-occupancy ryot was admitted to possession under a registered lease of more than five years duration in which case clause (e) is applicable. Still though the amending Act recognises the distinction between a tenant and one who holds over after having been a tenant, the inaccuracy of S. 153 (e) with reference to the context in which it occurs is allowed to remain unamended.

Hence it seems to me desirable for the purpose of argument to assume that the expressions non-occupancy ryot and tenant of old waste in Ss. 153 and 157 refer to a tenant of old waste who holds over after the expiration of his lease; and to consider the effect of S. 153 on this assumption.

S. 153 provides for two things: (1) the grounds on which alone

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a tenant (I shall use that term for shortness) may be ejected: so that any right of ejectment on other grounds that might have existed prior to the act are extinguished; (2) that the suit for ejectment can be brought only before the Collector.

The last sentence of the section lays down that nothing in that section (*i. e.*, that neither the restriction as to the grounds nor as to the court shall affect the liability of any person who is a non-occupancy ryot (or on the assumption I am making, who while he was a tenant was a non-occupancy ryot and is holding over) according to the provisions of this Act, to be ejected on the ground of expiry of the term of a lease granted before the commencement of this Act. It is true that the sentence does not lay down that there shall be a liability to be ejected on the ground of the expiry of such a lease. But it does lay down that in regard to such circumstances, the law outside the section shall prevail. It seems to me therefore that the substantive rights of the parties cannot be determined by reference to S. 153. This result is opposed to *Atchaparam* v. *Krishnayachendralu*[1] which proceeds on the basis that it is the contract of tenancy which gives the landholder the right to eject, and that such contract being controlled by S. 157, a landholder's right to eject is subject to Ss. 157 and 153. With great deference I cannot agree that it is the contract of tenancy which gives the landholder the right to eject after the expiry of the lease. It is rather that the right to be in possession having been parted with for a definite period—the period mentioned in the lease—after the expiration of the period, there is no right in the tenant to be in possession, and the landholder has the same rights in respect of the land as he had prior to the lease: those rights *ex-hypothesi* include the right to put any person the landholder likes into possession, and were *ex-hypothesi* exercised in favour of the tenant at the time when his lease was given effect to: at any rate the defendant who was put in possession by the landholder is estopped from denying landholder's right to put him in possession. The defendant therefore having no substantive right to continue in possession, he contends that the Civil Court alone has jurisdiction to evict him.

As the suit has been instituted in the Revenue Court, it is for the plaintiff to make out that the Civil Court has no jurisdiction. He contends that the jurisdiction of the Civil Courts has been taken away by S. 153. The last sen-

1. (1913) 24 M. L. J. 402.

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tence of that section provides that the *liability to be ejected* shall not be affected by the section. Does it mean therefore that the court in which the ejectment is to be brought shall be affected by the provisions of the section? The contrary was assumed by Miller, J. (according to him the point was apparently conceded in argument. *Ponnusami Padayachi* v. *Karuppudayan* [1]; and Spencer, J., expressly decided that the Civil Courts had jurisdiction. I agree with Spencer, J.'s reasoning to this extent, that when a person is in the first instance admitted as a ryot by the landholder it is implied that he is then recognised as a tenant; that where the owner of the land agrees to recognise another as his tenant only for a definite period, the latter's status changes after the expiration of that period, and in the absence of some act on the part of the owner of the land, showing a fresh recognition of tenancy the previous recognition is of no avail; in order that the holder over may be clothed afresh with the status of tenant, something less is necessary to be done than on the first recognition; what that requirement is, is indicated by such analogus provisions as the explanation to S. 6 of the Madras Estates Land Act and S. 116 of the Transfer of Property Act. When however S. 163 has to be construed, I feel difficulty in applying this analogy to any useful purpose; it can be useful only if it is recognised that there is a break in the legal personality of the tenant on the expiration of the term of the lease—a break in the legal effect of the first admission to possession—and that the admission of the tenant into possession will not avail the holder because the latter is a new legal person. On this point, S. 163 is so worded that we have no definite clue to the intention of the Legislature. Other provisions of the Act make it clear that in regard to persons in possession of ryoti land not being old waste, there is no such break. The fact that a tenant of old waste is specifically omitted from those provisions may be an indication. But still the difficulty remains whether any renewal of admission is necessary whether the admission to possession already obtained is to be taken to have come to an and though it is not so stated.

If therefore the jurisdiction of the Civil Court had to depend upon S. 163, I should have felt great doubt. The question however is whether the Act has conferred any jurisdiction on the Revenue Courts.

1. (1914) 26 M. L. J. 285, 286.

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The question resolves itself into whether the expression that the liability of the defendant to be ejected shall not be affected by S. 153 means only that his substantive rights shall not be affected by the section, or whether it also means that the determination of the Court in which a suit for ejectment may be instituted shall also not be affected. It seems to me that the context of the last sentence of S. 153 implies that the expression liability to be ejected was intended to cover not only substantive rights but also the *forum* in which the rights have to be enforced.

I see great practical difficulty in reading the section either way. If it is read, as I think it ought to be read, the result is that contrary to the general scope of the Act suits of such a nature as we are dealing with would have to be brought in a Civil Court; and possibly some reliefs arising out of the same transaction would have to be obtained in the Revenue Court, and others in the Civil Court. But if the section is read in the way my learned brother is inclined to read it, then the anomalies are even more serious. For in that case the Legislature specifies two cases in which alone the landholder has the right to get back possession of land that *ex-hypothesi* was in his possession and with the right to the possession of which he has agreed to part for only a definite period, these two cases are (1) where there was a registered lease for a term exceeding 5 years; (2) where the lease was granted before the commencement of the Act.

I cannot imagine that this was the intention of the Legislature; and as I have already said, this intention can be attributed to the Legislature only if the term non-occupancy ryot is read in S. 153 in the extended sense similar to that referred to in the explanation to S. 6 (1)

On the whole, therefore, it seems to me that S. 153 must be construed as follows:—(A) clauses (a), (b), (c,) and (d) refer to the rights of parties during the continuance of a tenancy (as distinguished from mere holding over), (B) clause (e) introduces an extension of the section to one specific case of holding over, (C) the final sentence restricts the operation of clause (e) and prevents a person whose lease was granted before the commencement of the Act from contending that he falls under clause (e).

To two objections to my construction of the section I have already referred (1) the splitting up of the jurisdiction between

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the Civil and Revenue Courts, (2) the inaccuracy in the use of the expression non-occupancy ryot in reference to clause (e). I feel the force of these objections but I think the difficulties in any other construction are still greater.

In the result, in my opinion, the Revenue Courts had no jurisdiction to give a decree in ejectment. In the circumstances of this case, I should have been extremely sorry to have come to the conclusion that the decree of the District Judge should be set aside. But I find that the decree also awards rent by way of damages to the plaintiff. That portion of the decree has not been attacked in argument before us. In my opinion, therefore, the appeal ought to be allowed to this extent that the order for ejectment should be omitted from the decree; but in other respects the decree under appeal should stand and the appellant should pay the costs of the respondent throughout.

The proper course (if my opinion as to the jurisdiction of the Court is correct), would have been to ask the plaintiff to file two plaints, one for a declaration and the other for damages. The former plaint would then have been returned by the Revenue Court for being presented to a Civil Court.

The Court.—The result is that the appeal is dismissed with costs.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.
[FULL BENCH]

Present:—Sir John Wallis, Chief Justice, Mr. Justice Ayling, and Mr. Justice Sadasiva Aiyar.

Subramania Aiyar ... *Appellant* (Plaintiff.)*

v.

Balasubrammania Aiyar (deceased) and others. *Respondents. (Defendants 1 & 2 and legal representation of deceased 1st deft).*

Subramania Aiyar v. Balasubramania Aiyar

Transfer of Property Act, Ss. 61, 99—Civil Procedure Code, Order 34, R. 1—Mortgage—Mortgagee holding two mortgages—Suit on second mortgage reserving rights under the first—Maintainability.

A person holding two mortgages on a property may sue for sale on the second mortgage reserving his rights under the first.

Second Appeal against the decree of the District Court of Tinnevelly in Appeal Suit No. 584 of 1910, preferred against the decree of the Court of the Additional District Munsif of Tinnevelly in Original Suit No. 60 of 1909.

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* S. A. No. 734 of 1912. 1st April, 1915.

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Sankaran Nair, J.

The Second Appeal came on for hearing before *Sankaran Nair and Tyabji, JJ.* on the 11th and 16th April, 1913 when the Court made the following

ORDER OF REFERENCE TO A FULL BENCH:—

Sankaran Nair, J.:—The plaintiff brought this suit for the sale of the properties which were mortgaged to him under two instruments, dated the 9th December 1894 and the 6th December 1901, respectively. In his plaint after praying for certain reliefs the plaintiff added that he would file a separate suit later on for the recovery of the debt due to him on the hypothecation bond for Rs. 2 000 executed in his favour on some of the properties specified in the plaint schedule and certain other properties.

An objection was taken in the first Court by the defendants (mortgagors) that a claim like this was not maintainable, that the plaintiff was bound to sue to recover the amounts due under all the mortgages and that he could not get a decree for the sale of certain properties subject to his claim on a mortgage. The claim which was reserved was on a prior mortgage. The District Munsif overruled the objection and passed a decree in the plaintiff's favour directing the properties to be sold for the debt which was found due on the two mortgages sued on, subject to the plaintiff's claim on the first mortgage.

On appeal the District Judge arrived at the conclusion that such a suit was not maintainable. He accordingly directed the plaintiff either to amend the plaint by also praying for the relief that he might be entitled to on the first mortgage or by abandoning his claim on that mortgage in respect of these items. The plaintiff abandoned his claim but reserved his right to question the District Judge's order in appeal. The decree of the first Court was confirmed by him with certain modifications as to the debt due.

In second appeal, a preliminary objection is taken by the respondents' pleader that no appeal lay against the decree of the District Judge, since there was nothing in the decree against which the plaintiff is entitled to take an objection; but the Judge holds in his judgment that the plaintiff is not entitled to reserve his claim and it is therefore impossible to say that the plaintiff has no right to appeal. Overruling this objection the question that remains for consideration is whether such a suit is

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maintainable. It was held by this Court in *Dorasami v. Venkataseshayyar* [1], and *Nattu Krishnama Chariar* v. *Annangara Chariar* [2], that it was not open to a mortgagee to bring a suit to recover the debt due under only one of the mortgages and to sell the property under the decree subject to his claim under a prior mortgage. Those decisions were based upon two grounds: first, upon S. 85 of the Transfer of Property Act which requires all persons interested in the mortgaged property to be made parties to the suit; and, secondly, upon the words of S. 61 of the Transfer of Property Act and upon the form of decree for sale, No. 128 of Schedule IV of the Civil Procedure Code (Act XIV of 1882). In a later case, *Radhakrishna Iyer* v. *Muthusawmy Sholagan* [3], it has however been held that there is nothing to prevent a decree being passed to enforce a mortgage subject to a prior mortgage. The prior decisions in *Dorasami* v. *Venkataseshayyar* [1], and *Nattu Krishnama Chariar* v. *Annangara Chariar* [2], were not referred to and the reasons given in those judgments have not been considered. In so far as those judgments were based upon S. 85 of the Transfer of Property Act, those judgments may now be disregarded, as that section has been repealed and Order XXXIV, rule 1 of Act V of 1908 now enacts that "a puisne mortgagee may sue for foreclosure or for sale without making the prior mortgagee a party to the suit"; and the rule itself says that it is only those persons having an interest either in the *mortgage security* or in the right of redemption that need be made parties to the suit. In so far as those judgments are based upon S. 61 of the Transfer of Property Act and the form of decree for sale given in the Civil Procedure Code, the reasoning still holds good. The learned Judges in *Dorasami* v. *Venkataseshayyar* [1], say that according to that form and according to that section a mortgagee cannot seek to obtain an order for sale on one of the mortgages only. Those provisions of law are practically reproduced now in the Civil Procedure Code, Order XXXIV, rules Nos. 2 and 4. There is no difference in this respect. We are unable to hold, therefore, that the decisions in *Dorasami* v. *Venkataseshayyar* [1], and *Nattu Krishnama Chariar* v. *Annangara Chariar* [2], have ceased to be in force on account of the repeal of the provisions of law then in force. These decisions however seem to be

1. (1901) I. L. R. 25 M. 108, s. c. 11 M. L. J. 373.
2. (1907) I. L. R. 30 M. 353, s. c. 17 M. L J. 501.
3. (1908) I. L. R. 31 M. 530, s. c. 18 M. L. J. 564.

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in direct conflict with the decision in *Radhakrishna Iyer* v. *Muthusawmi Sholagan* [1]. The question is an important one which very frequently arises, and it is therefore desirable that it should be set at rest by an authoritative ruling. We would therefore refer to the Full Bench for decision the question whether it is open to a mortgagee to bring a suit for the recovery of his debt by sale of the properties mortgaged to him subject to his interest in a prior mortgage.

Tyabji, J.:—I agree. I only wish to add that the following points seem to me to be involved in the question which we refer to the Full Bench: first whether the suit is defective by reason of a prior mortgage not being sued upon in the proceedings before the Court, in other words, whether the reservation purported to be made by the mortgagee of his right to sue upon the prior mortgage affects the maintainability of the suit on the later mortgage, and secondly, if a suit is so brought with such a reservation and a decree is purported to be passed with such reservation, whether the reservation can have any effect or whether a subsequent suit on the prior mortgage must be unaffected by the fact of any such reservation being made or omitted to be made. I do not wish to express any opinion on this point, but I should like it to be considered whether the decisions in *Watson* v. *the Collector of Rajshahye* [2], *Mohan Lal* v. *Ram Dial* [3], and *Sukh Lal* v. *Bhikhi* [4], have any, and if so, what bearing on this point. These decisions were not cited to us and have not been considered by me with reference to this case. The second point will also involve the consideration of the question whether, if the prior mortgage comes to the cognisance of the Court, the mortgagee (even though he should purport to reserve his rights under the prior mortgage) must of necessity be put to the alternative either of amending the plaint by suing upon both mortgages or of abandoning his rights under the prior mortgage.

[The Second Appeal came on for hearing on the 1st and 2nd March 1915.]

T. R. Venkatarama Sastri for the appellants.

The reference to the Full Bench has become necessary on account of the conflict between *Dorasami* v. *Venkataseshayyar* [5] and *Radhakrishna Iyer* v. *Muthusawmy Sholagan* [1].

1 (1908) I. L. R. 31 M. 530. 2. (1869) 13 M. I. A. 160.
3. (1880) I. L. R. 2 A. 843. 4. (1888) I. L. R. 11 A. 187.
5. (1901) I. L. R. 25 M. 108 s. c. 11 M. L. J. 373.

[*The Chief Justice* :—Apart from the decisions what does the Statute say ?]

O. 34, rr. 1, 2, 4 of the Civil Procedure Code and Ss. 60 to 62 of the Transfer of Property Act, are the material provisions. There is no legislative provision preventing a mortgagee of the same property from suing on his 2nd mortgage subject to the 1st.

[*The Chief Justice* :—Would not this work hardship to the mortgagor ?]

No; he can pay up. He has contracted a mortgage on which a sale could follow and he must take the consequence. The question has to be decided apart from any question of hardship. There is nothing in the statute to prevent a suit on the 2nd mortgage subject to the 1st in this case.

[*The Chief Justice* :—The principle of S. 61 of the Transfer of Property Act, is against you. See *Dorasami* v. *Venkataseshayyar*[1]].

I submit not. S. 61 of the Transfer of Property Act looks at the matter from the mortgagor's point of view. Even from the mortgagor's point of view, there is a difference of opinion. Shepherd and Brown in their Commentaries on S. 61 of the Transfer of Property Act extend the rule of consolidation to a case where the mortgagor has mortgaged the same property twice to the same person. They rely on *Dorasami* v. *Venkataseshayyar* [1]. Dr. Gour says that S. 61 has not the effect of laying down that where the mortgages cover the same property they should be redeemed together.

[*The Chief Justice*:—Is there any discussion of the question?]

Very little. On principle I submit that the rule of consolidation does not apply to a case where the same property is subject to two mortgages. See Ss. 60 and 62 of the Transfer of Property Act. For example, if the property is subject to a usufructuary and a simple mortgage, the mortgagor's right to recover possession on the discharge of a usufructuary mortgage is not incidental to redemption under S. 60, but expressly provided for in S. 62.

[*The Chief Justice* :—S. 61 makes it clear that except in the excepted case, there would be consolidation. I cannot treat the words " property other than that comprised in the mortgage " as a surplusage.]

Such an inference is opposed to Ss. 60 and 62. S. 60 will then, in effect, be abrogated by S. 61.

1. (1901) I.L.R. 25 M. 108s.c. 11 M.L.J. 372. 2. (1908) I.L.R. 31 M. 530.

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[*Sadasiva Aiyar, J.* :—Rather qualified; what is the reason for the doctrine of consolidation ?]

The historical basis of S. 61 does not apply to India. In England redemption was looked upon as a favour allowed to the mortgagor by equity, the legal estate having become vested in the mortgagee. The mortgagor who sought the "equity of redemption" must do equity to the mortgagee by redeeming all the mortgages. The English rule has no application to India where no distinction between the 'legal' and 'equitable' estate is recognised and the mortgagor is supposed to be the legal owner always. Even assuming that *Dorasami* v. *Venkataseshayyar* [1], correctly interprets S. 61, the section does not apply to a converse case of a mortgagee having 2 mortgages on the same property. Such a rule if it is to be applied to the mortgagee must rest on some independent foundation and not on an inference from S. 61 which admittedly deals with a different question.

[*The Chief Justice.*—The policy of S. 99 of the Transfer of Property Act would seem to forbid a sale by a mortgagee subject to an outstanding mortgage in his favour.]

That section is repealed and re-enacted in O. 34, r. 14 of the Civil Procedure Code with considerable changes. O. 34, r. 14 precludes the mortgagee from selling the right of redemption in execution of a money-decree only when it arises in respect of a claim arising *under the mortgage.* In respect of other money claims he can do so. The change is in my favour. *Dorasami* v. *Venkataseshayyar* [1], and the cases which followed it were based on S. 85 of the Transfer of Property Act, and the form of a decree for sale (No. 128 of Sch. 4 to the Civil Procedure Code of 1882). O. 34, r. 1 supplants S. 85. Under S. 85 of the Transfer of Property Act, it was necessary for all persons interested in the property to be made parties to a mortgage suit. The prior mortgagee had to be made a defendant in a suit on a second mortgage. If he was the holder of both the mortgages, he must sue on both. O. 34, r. 1 does not make the prior mortgagee a necessary party to a suit for sale by the puisne mortgagee. It is significant that O. 34, r. 1, occurs in an enactment dealing with procedure. Viewing the question as such, it makes no difference whether the puisne mortgagee and the prior mortgagee are different persons or one and the same person. O. 34,

1. (1901) I. L. R. 25 M. 108, s. c. 11 M. L. J. 373.

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rr. 2 (c), and 4 and Form No. 4 to App. D of Sch. I of the Code of 1908 contemplate one mortgage and do not touch the present question. On the other hand Form No. 7, cl. (3) suggests that there may be a sale on the 2nd mortgage subject to the first. See Ghose on Mortgages, pp. 593-4.

Coming to the decisions, the dicta in *Dorasami* v. *Venkataseshayyar* [1], are against me. But that was a case of a sale of property on a prior mortgage subject to a puisne incumbrance. The observations with regard to the present question were *obiter*. Moreover, much of the reasoning in that case is based on S. 85 of the Transfer of Property Act which has been repealed by O. 34, r. 1. The inference from S. 61 of the Transfer of Property Act is also untenable as the limitations to which a mortgagor is subject do not apply to the case of a mortgagee. *Sundar Singh* v. *Balu* [2], is in my favour. *Sri Gopal* v. *Pirthi Singh* [3], leaves the question untouched and open. *Nattu Krishnama Chariar* v. *Annangaru Chariar* [4], is distinguishable. There the decision turned on S. 85 of the Transfer of Property Act and on a question of estoppel. *Govinda Bhatta* v. *Narain Bhatta* [5], *Rangasami Nadan* v. *Subbaraya Ayan* [6], and *Radhakrishna Iyer* v. *Muthusawmy Sholagan* [7], are in favour of my contention.

[*The Chief Justice.—Rangasami Nadan* v. *Subbaraya* [6], and *Radhakrishna Iyer* v. *Muthusawmy Sholagan* [7], do not refer to *Dorasami* v. *Venkataseshayyar* [1].]

Venkataramana Iyer v. *Gompertz* [8] is against me but the observations are *obiter*. *Keshavram* v. *Ranchhod* [9] follows *Dorasami* v. *Venkataseshayyar* [1]. *Raghunath Prasad* v. *Jamna Prasad* [10], shows that a suit on the first mortgage is no bar to a suit on the second mortgage though both are held by one person. *Sundar Singh* v. *Balu* [2], allows a separate suit on each mortgage. *Gobind Pershad* v. *Haribar Charan* [11], is also in favour of separate suits. See also *Moro Raghunath* v. *Balaji Trimbak* [12]; and the Article in 20 M. L. J. p. 168 (journal portion). In the absence of a contract to the contrary between the parties, a suit of the nature in question is maintainable.

1. (1901) I. L. R. 25 M. 108.
2. (1898) I.L.R. 20 A. 322.
3. (1902) I. L. R. 24 A. 429.
4. (1907) I. L. R. 30 M. 353.
5. (1906) I.L.R. 29 M. 424.
6. (1907) I.L.R. 30 M. 408.
7. (1908) I.L R. 31 M. 530.
8. (1908) I. L. R. 31 M. 425.
9. (1905) I. L. R. 30 B. 156.
10. (1906) I. L. R. 29 A. 233.
11. (1910) I. L. R. 38 C. 60.
12. (1888) I. L. R. 13 B. 45.

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K. R. Rangaswami Aiyangar for the respondents.

O. 34, r. 1, has not effected any change in the law. It merely gave effect to the construction put on S. 85 of the Transfer of Property Act by all the High Courts, except Allahabad. *Mata Din Casodham* v. *Kazim* [1], was superseded by *Ram Shankar* v. *Ganesh Prasad* [2]. The prior mortgagee is not a necessary party after the enactment of the explanation to O. 34, r. 1. But he may be a proper party always. Unnecessary multiplicity of litigation will be avoided thereby. See *Mata Din Kasodham* v. *Kazim* [1]. The Court may add him if necessary under O. I., r. 10.

[*Sadasivayar, J.*:—The explanation to O. 34, r. 1, in effect deprives the power of the Court to add the prior mortgagee against his wish.]

Even so, the explanation to O. 34, r. 1 does not touch the present question. It has reference only to a case where the prior and the puisne mortgages are held by different persons. In the present case there is no question of joinder of parties. The plaintiff is before the court as a party and he cannot be heard to say that he is a party only as puisne mortgagee and not a party as a prior mortgagee. His position is at least that of a stranger holding a prior mortgage who is made a party to a suit by a puisne mortgagee. If a mortgagee-defendant omits to set up his encumbrance or if there are more than one, all his incumbrances, he will be barred by *res judicata* from bringing a suit on the mortgages so omitted. *Nattu Krishnama Chariar* v. *Annangara Chariar* [3], *Sri Gopal* v. *Pirthi Singh*[4] *Mahomed Ibrahim Husain Khan* v. *Ambika Pershad Singh* [5]. The plaintiff in this case must accordingly set up both the mortgages in the present suit; otherwise he will be barred from suing on the prior mortgage. S. 11, Explanation IV, Civil Procedure Code. If the prior mortgage was held by a stranger and he was a party to this suit, the decree would in the first instance provide for his redemption. See Form No. 8, App. D. to Sch. I, of the Civil Procedure Code. As in the present case the plaintiff is himself both prior and puisne mortgagee, the same result is achieved by asking the plaintiff to redeem his own prior mortgage

1. (1891) I. L. R. 13 A. 432. 2. (1907) I. L. R. 29 A. 385.
3. (1907) I. L. R. 30 M. 356. 4. (1902) I. L. R. 24 A. 429.
5. (1912) I. L. R. 39 C. 527.

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(*i.e.*) to seek relief in respect of the prior mortgage as well. There is no warrant for holding that when a prior mortgagee is a party to a suit by the puisne mortgagee, a sale could be ordered subject to the prior mortgage. O. 34, r. 12 read with form No. 8 shows that if the prior mortgage is not redeemed and the prior mortgagee consents to a sale, the property could be sold only "free from incumbrance." It will run counter to the principle of S. 85 of the Transfer of Property Act, (now O. 34, r. 1) if the rights of the prior mortgagee who is a party before the court should be reserved for another suit. It is the duty of the court when all the interested parties are before it to pass a decree which would deal finally with the rights of all the parties in the suit and to prevent further litigation. See *Rangasami Nadan* v. *Subbaraya Ayan*[1] *Balasubramania Nadar* v. *Sivaguru Asari*[2]. The reasoning in *Dorasami* v. *Venkataseshayyar*[3] applies and was intended to apply to a case like the present. Under S. 61 of the Transfer of Property Act, the mortgagor cannot redeem one of several mortgages secured on the same property. See *Dorasami* v. *Venkataseshayyar*[3], *Balasubramania Nadar* v. *Sivaguru Asari*[2]. The mortgagor's right to redeem several mortgages on the same property is a single cause of action. Similarly a mortgagee holding two mortgages on the same property has a single cause of action, *viz.*, the right to sue for sale of the mortgaged property and to recover therefrom all the amounts due to him on the date of the suit. The fact that there are two separate mortgage-deeds cannot affect the question. *Manonmani Ammal* v. *Vythilinga*[4]. The analogy is complete, for a mortgage suit is like a partition suit, a comprehensive one.

[*The Chief Justice.*—On what principle is the plaintiff to be forced to bring the property to sale in discharge of both the mortgages.]

Otherwise O. 2, r. 2, will be a bar to a suit on the mortgage omitted to be set up on the first occasion. (*Sri Gopal* v. *Pirthi Singh*[5]) and the mortgagee will be splitting his claims. See *Keshavram* v. *Ranchhod*[6], *Hari Narain Banerjee* v. *Keesum Kumari Dasi*[7], and *Atai Pramanik* v. *Arif Tarafdar*[8]. The

1. (1908) I. L. R. 31 M. 425.
2. (1909) 21 M. L. J. 562.
3. (1901) I. L. R. 25 M. 108.
4. (1913) 25 M. L. J. 481.
5. (1902) I.L.R. 24 A. 429.
6. (1905) I. L. R. 30 B. 156.
7. (1910) I. L. R. 37 C. 589.
8. (1914) 9 C. L. J. 590.

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object of O. 2, rr. 1 and 2 is to prevent multiplicity of suits. In the present case from the very nature of a mortgage suit, the prior mortgage is also "a subject in dispute" within the meaning of O. 2, r. 1. The plaintiff could have asked for sale free of incumbrance (i. e.,) have his prior mortgage paid off. If he did not, O. 2, r. 2 will apply. To prevent multiplicity of suits, at Common Law, a plaintiff could be compelled in a proper case to consolidate several causes of action against the same defendant. See Chitty on Pleadings, 6th Edition, page 199; *Cecil* v. *Briggs* [1]. Bakewell on Mortgage Suits, p. 15. Form No. 4 to app. D to Schedule I of the Civil Procedure Code clearly shows the intention of the legislature that a mortgagee-plaintiff should get all his claims on the mortgaged property satisfied once for all. He is not to reserve any rights on the mortgaged property to be made the subject of further litigation. The relief asked for by the plaintiff, *viz.*, the sale of the mortgaged property subject to his own prior mortgage offends the principle of S. 99 of the Transfer of Property Act (O. 34, r. 14 of the Civil Procedure Code,) which is to prevent a mortgagee from bringing to sale the Equity of Redemption alone of the mortgagor. *Kamini Debi* v. *Ramlochan Sirkar* [2], *Sunder Singh* v. *Bolu* [3]. With the exception of *Radhakrishna Iyer* v. *Muthuswami Sholagan* [4], all the other cases support my contention. *Nattu Krishnama Chariar* v. *Annangara Chariar* [5], and *Dorasami* v. *Venkataseshayyar* [6], were not considered in *Radhakrishna Iyer* v. *Muthuswamy Sholagan* [4]. The principle laid down in *Nattu Krishnama Chariar* v. *Annangara Chariar* [5], and *Dorasami* v. *Venkataseshayyar* [6], has been followed in S. A. 10 of 1912 and *Balasubramania* v. *Sivaguru Asari* [7], *Keshavram* v. *Ramchhad* [8], *Atab Pramanik* v. *Arif Tarafdar* [9], *Hari Narayan Banerji* v. *Kusum Kumari Dasi* [10], *Gobind Pershad* v. *Hari Har Charan* [11], favour the view laid down in *Nattu Krishnama Chariar* v. *Annangara Chariar* [5]. Though S. 85 of the Transfer of Property Act has been repealed and re-enacted as O. 34, r. 1 of

1. 2 Term Rep. 639.
2. (1870) 5 Beng. L. R. 450.
3. (1898) I.L.R. 20 A 322.
4. (1908) I.L.R. 31 M. 530.
5. (1907) I. L. R. 30 M. 553.
6. (1901) I. L. R. 25 M. 108.
7. (1909) 21 M. L. J. 562
8. (1905) I.L.R. 30 B. 156.
9. (1914) 19 C. L. J. 590.
10. (1910) I.L.R. 37 C. 589.
11. (1910) I. L. R. 38 Cal. 60.

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the Civil Procedure Code: the principle of S. 85 applies in all cases where the parties are before the court. O. 34, r. 1 merely gives an option to join a prior mortgagee. If he is joined the court's duty is to finally to adjudicate on his rights.' *Balasubramania* v. *Sivaguru Asari* [1], *Rangasami Nadan* v. *Subraya* [2].

T. R. Venkatarama Sastri (in reply):

The argument based on Form No. 8 is untenable. Suppose a 2nd mortgagee brings a suit on his mortgage impleading a defendant as 3rd mortgagee and not as 1st mortgagee though the latter holds the 1st and 3rd mortgages himself. O. 34, r. 1 allows him to do so. In such a case the 1st mortgage need not be redeemed. Form No. 8 is suited to a case where a puisne mortgagee impleads a prior mortgagee as such and seeks to redeem him. If the prior mortgagee does not wish to be redeemed the court can't sell anything more than the Equity of Redemption. A holder of two mortgages on the same property may reserve his prior mortgage and may sell it subject to the first. *Dhondo Ramchandra Kulkarni* v. *Bhikaji Gopal* [3]. Only, if he does not expressly reserve it, the rule of *res-judicata* may come into operation. It is impossible to hold that the first and second mortgages form one cause of action. O. 2, r. 2 is no bar. *Manmani Ammal* v. *Vythilinga* [4], is a case of partition. There is only a single cause of action for partition. This is not so in the case of two successive mortgages. *Dorasami* v. *Venkataseshayya* [5], and *Keshavram* v. *Ramchhod* [6] proceed on the assumption that prior mortgagees are necessary parties to a suit by a puisne mortgagee. After the enactment of O. 34, r. 1 the *ratio decidendi* of *Dorasami* v. *Venkataseshayya* [5], does not hold good.

[*The Chief Justice*:—*Balasubramania* v. *Sivaguru* [1], is strongly against you.]

That is a case falling directly within S. 61 of the Transfer of Property Act. The question of the mortgagee's disability did not arise. *Hari Narain* v. *Kusum Kumari* [7] proceeds on the ground of O. 2, r. 2 and has no bearing on this case. In *Atab Pramanick* v. *Asif Tarafdar* [8] the sale was not subject to 1st mortgage. There was a case of estoppel. The objection to

1. (1909) 21 M. L. J. 562.
2. (1908) I. L. R. 31 M. 425.
3. (1914) 17 Bom. L. R. 144.
4. (1913) 25 M. L. J. 481.
5. (1901) I. L. R. 25 M. 108.
6. (1905) I. L. R. 30 B. 156.
7. (1910) I. L. R. 37 C. 589.
8. (1914) 19 C. L. J. 590.

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passing a decree on a 2nd mortgage subject to a prior mortgage in favour of the same person was based on Ss. 85, 99 of the Transfer of Property Act and not on O. 2, r. 2. *Sesha Iyer* v. *Krishna Iyangar* [1]. *Sri Gopal* v. *Pirthi Singh* [2] is distinguishable. There is a distinction between a plaintiff and a defendant. If a person is a defendant, he is bound to put forward all his defences, though as a plaintiff he may be entitled to bring different suits thereon. *Mootoo Vijaya* v. *Katama Nachiar* [3].

[*The Chief Justice* :—*Rangaswami* v. *Subraya* [4] is imperative that a court should finally adjudicate on the rights of the parties.]

That was under S. 85 of the Transfer of Property Act.

[*The Chief Justice* :—S. 85, concerned itself only with parties and said nothing about the court's duty. The Chief Justice in that case deduces the rule from the English Law and applies it to India.]

Rangaswami v. *Subbaraya* [4] is not to be interpreted widely. The parties are before the court only so far as a particular right is concerned. The court could not adjudicate on claims between the same parties, other than those which form the subject-matter of the suit. O. 34, r. 12 gives an option to the prior mortgagee. The passage in Bakewell's "Practice in Mortgage Suits" at p. 15, is clearly with reference to S. 85 of the Transfer of Property Act. There is nothing to prevent a party confining his suit to the Equity of Redemption which alone is the subject the 2nd mortgage and selling it subject to the first mortgage. If the prior mortgagee does not want to be redeemed though he is a party and the puisne mortgagee does not want to redeem him, the mortgagor cannot compel redemption of the prior mortgagee by the puisne mortgagee. It ought not to make any difference in principle that both the prior and the puisne mortgagee are one and the same person.

The Court expressed the following

Opinion :—*The Chief Justice* :—In support of the view taken in *Dorasami* v. *Venkataseshayyar* [5], reliance was placed on the provisions of Ss. 61, 85 and 99 of the Transfer of Property Act, as well as on the form of decree No. 128 of Schedule IV

1. (1900) I.L.R. 24 M. 96. 2. (1902) I. L. R 24 A. 429.
3. (1866) 11 M. I A. 50 at 73. 4. (1908) I.L.R. 31 M. 425.
5. (1901) I. L. R. 25 M. 108.

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of the Code of Civil Procedure. The modifications introduced into Sections 85 and 99, when re-enacted as Order XXXIV, rules 1 and 14 in the Code of 1908, affect all these grounds except the first. Under Order XXXIV, rule 1 which is in accordance with the decision of the Full Bench of the Allahabad High Court in *Ram Shankar Lal* v. *Ganesh Prasad* [1] only parties interested in the mortgage security or the right of redemption need be joined in a suit relating to the mortgage, and the explanation makes it clear that a prior mortgagee is not to be regarded as interested in a suit brought by a puisne mortgagee for sale or foreclosure, or in a suit brought by the mortgagor to redeem a puisne mortgage. Consequently, he need not be made a party to such suits, and it follows that, if such a suit results in a decree for sale, the sale must be subject to his rights. It cannot therefore now be said that Order XXXIV rule 1 requires a prior mortgagee to be joined and the property to be sold free of his mortgage whether or not the prior mortgagee be the same person as the puisne mortgagee. Secondly, the language of rule 1 shows that in the case of a puisne mortgage what is mortgaged and has to be redeemed, that is to say, the mortgaged property, consists only of the equity of redemption under the prior mortgage, and that therefore the form of decree in Civil Procedure Code does not require that on redemption of the puisne mortgage, the land itself should be reconveyed free of the prior mortgage as well. This ground then can no longer be relied on. The argument based on Section 99 also goes, as the re-enacted Order XXXIV, rule 14 only debars the mortgagee from bringing the mortgaged property to sale otherwise than by a suit in enforcement of the mortgage, when such sale is in satisfaction of the mortgage-debt itself, and not, as under S. 99 of the Transfer of Property Act whatever the nature of the claim. This shows that the legislature does not consider it desirable except in the case specified to prevent the mortgagee from acquiring the equity of redemption otherwise than by suit upon the mortgage itself, and affords a strong argument against the imposition of such a restriction by the Court.

Coming now to S. 61 of the Transfer of Property Act, the provisions of that section which is modelled on S. 17 of the Conveyancing Act of 1881, are a restriction of the equitable rule

1. (1906) I.L.R. 29 A. 385.

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regarding the consolidation of mortgagees, *viz.*, that a mortgagor seeking to redeem a particular mortgage should be required at the same time to redeem all the other mortgages created by him in favour of the same mortgagee. I am unable to say that the provisions of this section afford sufficient reason for refusing to allow a mortgagee suing on a puisne mortgage to sell subject to a prior mortgage in his favour. It is no doubt laid down in *Vadju* v. *Vadju and another* [1] citing *Brown* v. *Cole* [2] that, in the absence of any stipulation, express or implied, to the contrary, the right to redeem and the right to foreclose must be regarded as co-extensive; but those observations were made with reference to the time for bringing such suits and not to their other incidents. On the other hand it was laid down generally in *Wickenden* v. *Rayson* [3], that a sale cannot be directed against a mortgagee, that is to say, free of his mortgage without his consent whether he be a party to the suit or not; see also section 96 of the Transfer of Property Act. Lastly, with reference to the query of their Lordships in *Sri Gopal* v. *Pirthi Singh* [4], as to whether in view of the provisions of section 43, Civil Procedure Code, now Order II, rule 2, a mortgagee having several mortgages on the same property is entitled to treat them as separate causes of action or must bring one suit on all his mortgages, I think we are bound by the decisions of this Court to say that he is entitled to treat them as separate causes of action.

In the result therefore I would answer the question referred to us in the affirmative.

Ayling, J.:—I agree.

Sadasiva Aiyar, J:—I entirely concur with the judgment of my Lord the Chief Justice.

The question referred to the Full Bench is "whether it is open to a mortgagee to bring a suit for the recovery of his debt by sale of the properties mortgaged to him subject to his interest in a prior mortgage." I agree with the decisions in the two cases decided by this Court in *Abdul Rahmian* v. *Mahomed* [5], (Muthuswami Aiyar and Best JJ.) and *Radhakrishna Iyer* v. *Muthuswamy Sholagan* [6], (Munro and Abdur Rahim, JJ.) which answered this question affirmatively.

1. (1880) I. L. R. 5 B. 22.
2. (1845) 14 Sim. 427.
3. (1856) 6 De G. M. & G. 210.
4. (1902) I. L. R. 24 A. 429.
5. (1892) 2 M. L. J. 188.
6. (1908) I.L.R. 31 M. 530.

As regards the *obiter dicta* in *Dorasami v. Venkataseshayyar* [1] and *Balasubramania Nadar v. Sivaguru Asari* [2], I agree generally with the acute criticisms found in the article beginning at page 168 of 20 M. L. J. though I differ from the learned critic in respect of his remark (at page 170) that "it does not seem legitimate to infer" from section 61 of the Transfer of Property Act that a mortgagor cannot redeem one of two mortgages made of the same property to the same person. I also agree with the judgment of Beaman, J., in the case in *Dhondu* v. *Bhikaji* [3]. I might be permitted to suggest to the legislature that S. 61 of Act IV of 1882 might be replaced by a section enacting that all consolidation even in the case where the mortgagee and mortgagor are the same persons and the property is the same, is abolished.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Seshagiri Aiyar and Mr. Justice Kumaraswami Sastri.

Ry. Sivaji Rajah Sahib and Ry. Prathapa Simha Rajah Sahib. *Appellants.** (*Defendants Nos. 1 & 2*).

v.

Ry. V. Aiswariyanandaji Sahib and others. *Respondents. (Plaintiffs).*

Receiver—Application for appointment of, pending suit—Defendants in possession under order of Magistrate and with a prima facie *superior claim—Effect—Trust property—Poverty of trustee—Management by rotation, not a ground for appointing receiver—Long leases—Discretion—Property* in media *after the death of the owner—Appointment of receiver.*

Where the plaintiffs sued for recovery of certain properties from the defendants who were in possession of the same claiming to be the heirs of the last owner, but it appeared that the defendants had a better *prima facie* title and had also been recently maintained in their possession of the properties by an order of the Magistrate,

Held, that there was no ground for the appointment of a receiver.

The mere fact that the defendants are poor or that they manage the property by rotation is no ground for removing them from the management of endowment properties in their possession and appointing a receiver.

It may be an error of judgment on the part of a trustee to grant long leases but it is no ground for removing him from management.

If the facts are undisputed and the lower Court comes to the conclusion that a receiver should or should not be appointed, ordinarily the appellate Court would not interfere with the lower Court's exercise of discretion; but it is otherwise where it is found that the lower Court has come to a wrong conclusion on the facts.

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* A. A. O. No. 26 of 1915. 16th April 1915.

1. (1901) I. L. R. 25 M. 108. 2. (190?) 21 M. L. J. 562.
3. (1914) 17 Bom. L. R. 144.

Sivaji Rajah Sahib v. Aiswariyanandaji Sahib.

Where property is *in medio* after the death of the last owner and a dispute exists as to who is entitled to the property, the proper procedure is to appoint a receiver.

Appeal against the order of the Court of the Subordinate Judge of Tanjore dated 14th day of December 1914 in I. A. No. 1918 of 1914 in O. S No. 43 of 1913.

The Hon'ble the Advocate-General (F. H. M. Corbet) and *G. S. Ramachandra Iyer* for appellants.

T. Ranga Chariar for Respondents.

The Court delivered the following

Judgment:—The late Maharajah Sivaji of Tanjore died in 1855. The dispute in the present case relates to the properties which were endowed to certain temples by the late Rajah and to certain private properties belonging to the estate of the late Rani. The senior Rani Kamakshiboy succeeded to what is known as the Palace Estate as well as to the temple properties. The defendants in this case claimed to be the sons of the adopted son of Rajah Sivaji. The plaintiffs allege that they are the sons of the deceased Maharajah by ladies known as his Sword-wives. The last of the Ranis, Mathu Sri Jeejamba Boy Sahiba died on the 3rd May 1912. The case for the plaintiffs is that they are entitled to succeed to the management of the Devasthanams and to enjoy the private properties in preference to the defendants the validity of whose father's adoption they deny. The plaintiffs applied to the Subordinate Judge for the appointment of a Receiver pending the disposal of the suit. He granted their prayer. The defendants have prefered this appeal. A large number of charges alleging mismanagement, malversation, waste *etc.*, were prefered against the defendants. Apparently before the Subordinate Judge only six of these charges were pressed for decision. He found four of them proved, and on the strength of this finding made the order for the appointment of a receiver.

Before dealing with the charges *seriatim*, it is necessary to mention that immediately on the death of the last Rani, disputes regarding the possession of the properties arose between the plaintiffs on one hand and the defendants on the other. On the 13th of August 1912 the Sub-Divisional Magistrate held that the possession of the defendants should be "*maintained*", and directed the plaintiffs to establish their claim in a Civil Suit. This present suit was instituted as a result of that adjudication by the Magistrate. The Subordinate Judge criticises at considerable length

the conclusion of the Sub-Divisional Magistrate regarding possession. Although it is open to a Civil Court to come to a different conclusion from the Magistrate on materials placed before it, the Judge has no right to sit in judgment over the findings of fact the Magistrate has arrived at, by a review of the evidence produced in the Magisterial proceedings. The Subordinate Judge is not hearing the appeal from the Sub-Divisional Magistrate. The conclusion of the Magistrate, five months after the death of the late Rani was that the defendants had been in possession of the properties and that they should be maintained in that possession. He found against the plaintiffs' contention that they were peacefully in possession. The question for consideration, therefore, is, whether the evidence let in justifies the order of the Subordinate Judge directing the appointment of a Receiver. No oral evidence was let in and the Court below acted solely on the affidavits filed by both the parties. The first charge which the Subordinate Judge holds to have been proved is dealt with by him in paragraph 9 of the judgment. The charge relates to the lease of Mariyambalpuram village for 20 years at the rate of Rs. 15 per pangu. It was contended that having regard to the rise in the price of paddy and seeing that under Exhibit G. the parties were entitled to revert to the Amani system after the termination of that lease, the rate of rent secured under the new lease is highly detrimental to the interests of the Devasthanams. Mr. G. S. Ramachandra Aiyar who has worked out the figures with reference to the deductions to be made under the earlier lease deed, Exhibit G, has shown that the rate secured under the new lease compares favourably with what was payable under Exhibit G. The Subordinate Judge lays considerable stress on the fact that the sale price of paddy is at the rate of Rs. 2 per kalam. He has not paid sufficient attention to the decision of the Revenue Officer in Exhibit VIII to the effect that the commutation rate in one of the temple villages is Rs. 1-4-0 per kalam. The market rate is different from the commutation rate, which the tenants have to pay under the Estates Land Act. A certain average is arrived at in the latter case in fixing the commutation rate and it is upon that standard that the rent due from tenants has to be recovered. It is true that the defendants have with unseemly haste entered into leases for a long period of time. It is pointed out that under the previous lease the period was

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20 years and that generally the temple properties are leased out for a considerable length of time. It may be an error of judgment to grant long leases where the tendency of prices is to rise higher year after year. But that is no ground for considering that the defendants have wilfully surrendered rights belonging to Devasthanam. We must hold that this charge has not been proved against the defendants.

[The judgment next deals with the other charges against the defendants.]

These are the specific charges that have been considered by the Subordinate Judge.

In addition to these Mr. Rangachariar drew our attention to the fact that the defendants are not in solvent circumstances, and that in the interests of the temple it is not desirable that persons of such poor means should be in charge of the properties. It is common ground that the properties are considerable and that the income from them is nearly a lakh of rupees a year. Mr. Rangachariar also draws our attention to the fact that the two defendants are young and inexperienced and that they are managing the properties through their agents in rotation. This, he suggests, will lead to difficulties in the recovery of the rent from the tenants. The system of management by rotation is well-known in this country and the sanction of the Privy Council was given to it in *Ramanathan Chetti* v. *Murugappa Chetti* [1]. We see no ground for the appointment of a Receiver because there is management by rotation. As has been pointed out in Beach on Receivers, section 600, as a general rule, the poverty or insolvency of a trustee is not a ground for a receiver unless there be in addition thereto some danger or loss to an estate. Vide *Anonymous* 12 Vesey 4 and *Howard* v. *Papera* [2]. Moreover in the present case the defendants are in receipt of pensions from the Government and are legatees under the will of the late Rani in respect of the Mukhasa properties. However, in order to safeguard the interests of the temple we have resolved that pending the disposal of the suit the defendants should furnish security in the sum of Rs. 10,000 to the satisfaction of the Subordinate Judge for the proper management of the properties. Mr. Rangachariar contended that the general rule that parties in

1. (1906) I.L.R. 29 M. 283: s.c. 16 M L.J. 265 (P.C.)
2. (1815) I, Maddox 142: s.c. 56 Eng. Rep. 54.

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possession should not be lightly displaced by the appointment of a receiver does not apply to cases of recent or disputed possession; and he quoted the analogy of S. 239 of the Indian Succession Act for this purpose. It is true that where property is *in media* after the death of the last owner and when a dispute exists as to who is entitled to that property, the proper procedure is to appoint a receiver. That is often done in England and that principle has been accepted in this country. But where a party is in peaceful possession and that possession has been secured to him by an order of the Magistrate, the analogy of S. 239 cannot apply. The present case is more analogous to that of a person in whose favour a probate in common form has been granted and a caveat is entered against his right to administer the estate. The case of *Newton* v. *Ricketts* 1, quoted by the learned Advocate-General establishes that in such circumstances a receiver should not ordinarily be appointed. Lord Langdale in delivering the judgment of the court says "it is satisfactory to find that the authorities show that such a state of things alone affords no right to relief, though it may, if connected with other circumstances, induce the court to interfere and protect the property." A person who obtains possession after the will has been proved in common form has only recent possession and when that possession is accepted by the caveator, if a receiver should not displace the party originally put in possession, we see no reason why where a Magistrate has maintained a party in possession and his right is disputed by the opposing party a receiver should be appointed. Mr. Rangachariar strongly pressed upon us the decision of *Shadi* v. *Anup. ingh* 2 which lays down that the discretion of the lower court should not be interfered with. If the facts were undisputed and the court below had exercised the discretion in a particular way, ordinarily the appellate court would be unwilling to interfere with that discretion. But where, as in this case, we find that the Subordinate Judge has come to a wrong conclusion on the facts we do not think that the decision in *Shadi* v. *Anupsingh* 2, has any application.

There is only one other circumstance to be noticed and that relates to the *prima facie* title of the plaintiffs. The plaintiffs claim to be the legitimate sons of the deceased Rajah. They may be able to establish that in the suit. But it is permissible

1. (1847) 10 Beav. s. c. 50 Eng. Rep. 684. 2. (1889) I. L. R. 12 A. 436.

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to point out that the Government in granting the pension to the sons of the adopted son of the late Rani did not recognize the rights of the plaintiffs. On the other hand the defendants are in receipt of pensions from the Government; and *prima facie* their claim is superior to that of the plaintiffs. Under these circumstances we do not think that the plaintiffs have shown a better *prima facie* title than the defendants. Although we have come to the conclusion that the order of the Subordinate Judge must be set aside, we think it desirable in the interests of the trusts that the defendants should be called upon to furnish (*a*) quarterly accounts of their management to the Subordinate Judge (*b*) that they should take the permission of the lower court for any lease over a year, and (*c*) that they should within three months from this date furnish security for 10,000 to the satisfaction of the Subordinate Judge. We reverse the order of the lower court and dismiss the petition for the appointment of a receiver. We make no order as to costs. As regards the memo of objection it is enough to point out that the alleged attempt to alienate the Mukhasa properties will not prejudice the plaintiffs as it would be affected by the *lis pendens*. There are no serious allegations of waste. We agree with the Subordinate Judge's conclusions on this matter.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Sir John Wallis, Kt., Chief Justice and Mr. Justice Seshagiri Aiyar.

S. T. M. V. R. Muthuraman Chettiar ...*Appellant* * (*Defendant*).

v.

Ponnusamy Udayar ...*Respondent* (*Plaintiff*).

Muthuraman Chettiar v. Ponnusamy Udayar.

Hindu Law—Joint Family—Partition—Agreement that the property of one of the brothers dying without male issue, should go by survivorship to others—Validity—Transfer of Property Act, S. 6 (a).

A provision in a partition-deed between four brothers that in the event of the death of any one of them without male issue, his share of the joint family properties after deducting any alienat ons made by him should be divided among the surviving brothers is valid, and is neither in contravention of Hindu Law nor obnoxious to the provisions of S 6 (2) of the Transfer of Property Act.

Kanti Chandra Mukerji v. *Ali Nabi* [1] followed.

Appeal from the decree of the Court of the Temporary Subordinate Judge of Trichinopoly in O. S. No. 14 of 1913.

The suit was for a declaration that the plaint-scheduled property can be brought to sale by the defendant in execution of the decree

* A. S. No. 266 of 1913. 12th April 1915.

1. (1909) I. L. R. 33 A. 414.

in O. S. No. 534 of 1911 on the file of the District Munsif's Court at Trichinopoly, only subject to the plaintiff's mortgage-right. There were four members of a Joint Hindu family, Maria Pillai, Doraswami, Balakrishna and Narasu. On 20-7-1904, they entered into a deed of partition which was subsequently registered. After allotting to each member his share of the properties, the partition-deed (Exhibit A in the case) provided as follows: "As we four have thus entered into a partition, each should enjoy his share until his death; and when the deceased leaves no male issue the properties which may remain at the time of death, after excluding the properties that may have been alienated by him, should go rateably to the other sharers.. ..." Maria Pillai died, leaving a widow and a daughter but without male issue and his properties including the plaint-scheduled one were taken possession of by the survivors, as per Exhibit A. On 31-5-1911, Doraswami, Balakrishna and Narasu hypothecated the plaint-scheduled property to the plaintiff for Rs 5,000. The defendant obtained a decree in O. S. No. 534 of 1911, upon a promissory note executed by the deceased Maria Pillai against his widow, daughter and the other surviving members. In execution of that decree, he attached the plaint-scheduled property and brought it to sale. The plaintiff put in a claim-petition, stating that his hypothecation was prior to the attachment by the defendant and that the property could be sold only subject to plaintiff's mortgage-right. The claim petition was dismissed, one of the grounds being that the provision in Exhibit A regarding the devolution of Maria Pillai's property after his death was inoperative and that the plaintiff's mortgage conferred no right upon him. The plaintiff instituted the present suit which the Subordinate Judge of Trichinopoly decreed in his favor. The defendant appealed.

T. R. Krishnaswami Iyer for the appellant.

V. V. Srinivasa Iyengar and *A. Narasimha Chari* for the respondent.

The Court delivered the following

Judgments:—*The Chief Justice.*—The short question in this case is whether an attachment obtained by the defendant in execution of a decree against the widow of the late Maria Pillai and his three divided brothers should not be declared to be subject to a mortgage in favour of the plaintiff executed by the three surviving brothers in satisfaction of his debts. Ordinarily, of course his

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widow would have been his heiress, but under the terms of the partition-deed, Exhibit A, between the four brothers, it was provided that in the event of the death of any one of them without male issue, his share of the joint family properties after deducting any alienations made by him should be divided among the surviving brothers. It was held in *Kanti Chandra Mukerji* v *Ali Nabi* [1], in a precisely similar case that such a settlement was neither in contravention of Hindu Law nor obnoxious to the provisions of the Transfer of Property Act, S. 6 (2) as being a transfer of an expectant interest in property. After the partition the settlers had full powers of disposition over their respective shares, and were at liberty to provide by settlement *inter vivos* what should become of those shares in the event of their deaths without male issue. They might, even according to the English decisions, have bound themselves by contract to dispose of their property in a particular way by will, and I see no objection to their doing so by settlement. I think the appeal fails and must be dismissed with costs.

Seshagiri Aiyar :—Four brothers entered into a partition of their family properties on the 20th of July 1904. The deed of partition (Exhibit A) provided that "the respective parties should take and enjoy the properties which fell to their share, with the right to alienate the same by gift, sale, etc." Then it provided for a right of pre-emption, if one of the brothers should desire to sell his share. The clause which is in dispute in this case is in these terms: "As we four have thus entered into a partition each should enjoy his share until his death; and when the deceased leaves no male issue the properties which may remain at the time of death, after excluding the properties that may have been alienated by him should go rateably to the other sharers." Maria Pillai, one of the four brothers died without male issue but leaving a widow and a daughter. Maria Pillai died in 1911. The defendant in this case obtained a decree against the widow of Maria Pillai and others for a debt due by the deceased. The three surviving brothers executed a deed of mortgage to the plaintiff in this case on the 31st May, 1911, for Rs. 5,000. The consideration is said to consist of debts payable by the deceased Maria Pillai. When the property was attached in execution of the decree obtained by the defendant, the plaintiff put in a petition that the property should be sold subject to his

1. (1909) I. L. R. 33 A. 414.

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mortgage. The claim was rejected. The present suit is brought for a declaration of plaintiff's rights under the mortgage. The Subordinate Judge upheld the plaintiff's contention and gave him a decree as prayed. He relied chiefly upon the decision in *Kanti Chandra Mukerji* v. *Ali Nabi* [1], which is practically on all fours with the present case. Although the point cannot be said to be free from doubt, I am not prepared to differ from the view taken in *Kanti Chandra Mukherji* v. *Ali Nabi* [1]. In the present case there is no restraint upon alienation. The last clause to which I have referred would apply only to the residue of the property which may be left by Maria Pillai after making such alienations as he chose during his lifetime. It was contended that the provision for the undisposed of properties devolving upon the remaining brothers is practically a restraint upon the power to make a will, which is equivalent to a restraint upon alienation. It is doubtful whether Maria Pillai was not competent to dispose of the property by will notwithstanding the language used in this clause. Even on the supposition that the clause imposes fetters upon the powers of devise, I am not satisfied that such a covenant is invalid.

Under the English law it was held in *Goylmer* v. *Paddiston* [2], by Lord Chancellor Finch that a contract to devise lands can be enforced by persons claiming under the party who makes the contract. In *Goilmore* v. *Battison* [3], *Fortescue* v. *Hennah* [4], this view was accepted as correct. All these cases are reviewed in *In re Parkin Hill* v. *Schwarz* [5], where it is pointed out that although the persons in whose favour there is a contract to make a will can sue to enforce it, the courts should not give relief if the object of the contract is to enable the grantee to exercise only a power of appointment. I think that, as Maria Pillai was absolutely entitled to the property and could have disposed of it in any way he chose, the clause in the partition must be construed as a contract to leave the undisposed of residue to his brothers. The English decisions to which I have referred show that such a contract as this is not void. There is no question in this case of creating a new line of succession as in *K. Venkata-*

1. (1911) I. L. R. 33 A. 414.
2. 2 Ventries 353, s.c. 86 E R. 482.
3. (1682) 1 Vernon 48, s.c. 23 E.R. 301.
4. (1812) 19 Vesey 67, s.c. 34 E.R. 448.
5. (1892) 3 Ch. 510.

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ramanna v. *K. Brahmanna Sastrulu* [1] and in *Ananthatirtha Chariar* v. *Nagamuthu Ambalagaren* [2]. If the clause had directed that the property should go in a particular line of succession, then the *Tagore case*[3] would be applicable and the direction would be invalid. Reference may be made to the cases in which it has been held that agreements not to divide property were held enforceable although they would not prevent a party entering into such an agreement from alienating it. See *Anand Chandra Ghose* v. *Prankista Dutt* [4] and *Rajender Dutt* v. *Sham Chund Mitter* [5]. The Bombay High Court in *Ramalinga Khanapure* v. *Virupakshi Khanapure*[6] seem to doubt this position. But the preponderance of authority is in favour of the view that the parties who are entitled to divide a property can waive their rights. It was stated by Lyndhurst, L.C. in *Jeffreys* v. *Jeffreys* [7]. "My impression is that the principle of the Court to withhold its assistance from a volunteer applies equally, whether he seeks to have the benefit of a contract, a covenant, or a settlement." But in later cases it was held that this would not affect provisions in a marriage settlement for giving the property or devising it. (See *Lee* v. *Lee* [8]). This view proceeds on the principle that in marriage settlements "consideration permeates all covenants." The same may be said of covenants in partition deeds entered into among members belonging to a joint family. I am therefore prepared to follow *Kanti Chandra Mukerjee* v. *Ali-i-Nabi* [9] and *Ram Nirunjan Singh* v. *Prayag Singh*[10]. The decision of the Privy Council in *Purna Shashi Battacharji* v. *Kalidhan Rai Chowdhuri*[11] only lays down that where an attempt is made to alter the line of succession by means of a provision for the devolution of the estate on the death of one of the members without male issue, such an arrangement is opposed to the decision in the *Tagore case* [3], and that it should not be given effect to. But where there is no attempt to create a new line of succession, I see no reason for holding that as a contract come to at the time of the partition the clause should not be given effect to.

I agree with the learned Chief Justice to hold that the decision of the Subordinate Judge is right and that this appeal must be dismissed with costs.

1. (1869) 4 M. H. C. R. 345.
2. (1881) I. L. R. 4 M. 200.
3. (1872) L. R. 1 I. A. Supplemental Volume 47.
4. (1869) 3 Beng. L. R. O. C. 14.
5. (1880) I. L. R. 6 C. 106.
6. (1883) I. L. R. 7 B. 538.
7. Craig Phillips 139.
8. (1876) 4 Ch. D. 175.
9. (1911) I. L. R. 33 A. 414.
10. (1881) I. L. R. 8 C. 138.
11. (1911) I. L. R. 38 C. 603, s. c. 21 M. L. J. 1119.

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IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Seshagiri Aiyar and Mr. Justice Kumarasami Sastri.

Lodd Govinda Doss Krishna Doss Varu and another ... *Appellant* in A. A. O. No. 226 of 1911 (Petitioners).*

v.

The Rajah of Karvetnagar, Minor by Guardian by W. A. Varadachariar and other. ... *Respondents (Respondents).*

Civil Procedure Code, O. 21, r. 2—Inquiry by Court—Mortgagee in possession—Decree not providing for accounts of profits—Taking of accounts in execution—Not permissible—Statement by decree-holder of willingness to give credit for profits in application for sale—Inquiry as to amount—Notice to judgment-debtor on—Executability as arrangement sanctioned—Estoppel.

Where a decree for sale was passed in favour of a mortgagee in possession for principal and interest but the decree failed to provide for the taking of accounts of the profits that might thereafter be received by the mortgagee.

Held, that it was not open to the executing Court to direct the taking of such accounts and the fact that the parties put a different construction on the decree made no difference.

But held, the decree-holder having intimated to the Court in his application for sale that the net profits should go in reduction of the decree amount, it was open to the Court to treat the application as a certificate of adjustment and direct an inquiry as to the amounts collected by him.

The circumstances under which the Court could direct an inquiry in connection with an alleged adjustment considered.

Held, also the Court having ordered notice on the intimation of the decree-holder that he was prepared to give credit for amounts collected, and the judgment-debtor not having objected to the course, the arrangement could be given effect to in execution on the principle of *Sadasiva Pillai* v. *Ramalinga Pillai* [1].

Appeals against the orders of the District Court of North Arcot in C. M. P. No. 520 of 1911 (in E. P. No. 145 of 1905 in O. S. No. 12 of 1901) and in C. M. P. No. 145 of 1905 (in O. S. No. 12 of 1901) dated the 11th October 1911 and 7th August 1911 respectively.

R. Sadagopa Chariar, *T. Ranga Chariar*, *S. Srinivasa Aiyangar* and *K. Bashyam Aiyangar* for Appellants.

L. A. Govindaraghava Aiyar for Respondents.

The Court delivered the following

Judgment:—These appeals are from an application to execute a mortgage decree. The decree was passed in favour of the appellant's father on the 29th of September 1903. The suit itself was instituted in 1901. At the time of the institution of the suit, the Court of Wards was in charge of the estate a portion of

* A. A. O. Nos. 266 and 267 of 1914. 29th April 1915.

1. (1875) L. R. 2 I. A. 219.

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which was mortgaged to the appellant's father. The possession of the Court commenced in 1900 and was relinquished in or about September 1905. The appellant took possession of the village thereafter. There is a dispute as to the exact date when he assumed management. He presented his application for an order absolute and for the sale of the mortgaged properties in December 1905. That order has not been exhibited in these proceedings. The District Judge says "Before the order for sale was passed, it was not however ascertained what the balance of the mortgage-debt outstanding at the time of the application was, nor was the order absolute made for the realisation of any specific amount." This statement of the Court below has not been contested before us. On the 2nd of September 1909, the District Judge granted a prayer for execution and called for an affidavit, a draft proclamation and an encumbrance certificate from the appellant. On the 7th of October 1909, the appellant filed his affidavit. The judgment-debtor filed a counter-affidavit objecting to the valuation of the property and to the amount stated to be due to the decree-holder. On the 7th of August 1911, the District Judge passed an order to the effect that having regard to the dispute about the amount due, it is desirable that a commissioner should be appointed to ascertain it. His order says: "The decree-holder's vakil does not object to this being done." Then he referred to the suggestion of the vakil that the accounts should be examined at the village and not in court, and said that the request was reasonable. It is clear that on this date, the decree-holder through his vakil consented to the appointment of a commissioner. The only outstanding dispute was as to the place where the examination of the accounts should take place. But on the 8th of August and on the 11th of August, the vakil is said to have filed two petitions requesting that the question "whether the decree being one for sale, the petitioner decree-holder was bound to account at all under the terms of the decree in the execution proceedings, and whether the judgment-debtor could insist on accounts being rendered in these proceedings" should be determined before a commissioner was appointed. These two petitions are said to have been withdrawn. We regret that this should have been allowed. The grounds on which the vakil wished to recede from the position taken up by him on the 7th of August, are material. The vakils on both sides were heard

on these petitions. Finally, the District Judge affirmed his previous order on the 11th October 1911. Civil Miscellaneous Appeal No. 266 of 1911 is presented against this final order. C. M. A. No. 267 of 1911 is against the earlier order of the 7th August.

The appeals have been argued at great length. A preliminary objection was taken that no appeal lay against the first order as that was passed on consent. We do not think S. 96 (3) applies to an order directing the appointment of a commissioner. Reference may also be made to O. 33, r. [illegible]. and to *Mata Palat* v. *Beni Madho* [1]. Moreover, although the vakil for the appellant accepted the suggestion to appoint a commissioner, the District Judge formed his own conclusion on the materials placed before him. We must over-rule the preliminary objection.

The matter in dispute between the parties relates to the amount received by the decree-holder from the mortgaged property after he took possession of it from the Court of Wards. The judgment-debtor contended that the appellant should give credit to the net income received by the appellant and that execution should issue only for the balance. The decree-holder does not deny that he is liable to account to the judgment-debtor for the profits realised as mortgagee in possession, but argues that this liability does not prevent his levying execution for the full amount entered in the decree. There can be no manner of doubt that the conduct of the decree-holder led the judgment-debtor to believe that a separate suit for an account of the income need not be instituted and that credit will be given for the net profits in execution. It was said that a suit for the recovery of the profits will now be barred by limitation, whether there will be any such bar, and if so, to which extent need not be gone into in these proceedings. The first question we have to decide is, whether under the decree the appellant is bound to give credit for the income received by him as mortgagee in possession. The decree says: " This court doth further order and decree that the plaintiff be entitled to the net rents and profits of the mortgaged property from the beginning of fasli 1310 according to the provisions of S. 43 (5) of Madras Act I of 1902, and that all payments made to the plaintiff on account thereof be applied in reduction of the amount due to him under the compromise deed. " As we pointed out before, this decree was passed when the Court of Wards was in possession. Its intervention was sought by the Zamindar for the

1. (1914) I. L. R. 36 A. 172.

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purpose of liquidating the enormous debts which had accumulated over his estate and of saving, if possible, a portion of the estate for him. It was because the court found that there was no possibility of securing to the Zamindar any portion of the property it gave up possession in 1905. Therefore, when it assumed possession, it was with the object of paying to the secured creditors the income available from the properties mortgaged, so that after crediting a portion of the payment for the interest accruing due, the balance may be applied towards the discharge of the principal debt. The Court of Wards is in the position of a receiver, *Adipuranam Pillai* v. *Gopalasami Mudali* [1]. When these facts are remembered, the provision in the clause for the payment of the net profits becomes intelligible. It is true, as pointed out by Mr. Govindaraghava Aiyar, S. 43 (5) does not provide for any payment. By reference to Ss. 32 and 55, it is clear that the calculation mentioned in S. 43 will determine the net income which the court having management will be in a position to set apart for payment to the mortgagee. S. 32 distinctly provides for the payment of the debts due by the Ward. However that may be, there is no warrant for reading into the clause a provision that when the mortgagee is in possession, he has to apply the net income towards the decree-debt. There are patent objections to such a construction. The clause speaks of payment and not of appropriation. S. 43 (5) which is referred to in the clause, speaks of a dispossessed incumbrancer. That same section provides for the net profits being recoverable from the Court of Wards. Obviously, therefore, the decree had reference to the management by the court and to the payment to be made by it and not to the resumption of possession by the decree-holder. It was by an oversight that the decree did not provide for the contingency of the court withdrawing from the management. There is no warrant for importing into the decree a provision like the one which the judgment-debtor says was in the contemplation of the parties. That would be adding to the decree and not construing it. It was argued that if the parties understood the decree in a particular sense, the courts should give effect to it. We have no clear evidence in this case of any course of conduct by the parties which placed the construction we are asked to adopt. Nor do we think that the contention that courts are bound to construe a decree in the mode which the parties intend-

1. (1907) I. L. R. 31 M. 351.

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ed it to operate is well-founded. If a particular construction has been placed by the court on a decree and if he has been enforced by the process of the court, the parties may be estopped from claiming that the decree should be differently construed. Even this view has its limitations. But we know of no authority or principle which renders the executing court a mere recording machine for the interpretation which the parties choose to put upon a decree, however incompatible such a construction may be with the plain language of the decree. *Secretary of State for India in Council* v. *Durbijoy Singh* [1] does not help the respondent. On other hand, *Bakhtawar Begam* v. *Hussaini Khanam* [2] suggests that it is the duty of the court to execute the decree as it finds it and not as understood by the parties. We must hold that the decree does not provide for the application of the rents and profits received by the decree-holder in satisfaction of the decree.

One other minor contention may be disposed of before dealing with the principal question. In the course of the execution-application the pleader for the decree-holder undoubtedly assented to the appointment of the commissioner at one stage of the proceedings, although he subsequently withdrew his consent. In *Venkata Narasimha Naidu* v. *Bashyakarlu Naidu* [3], the Judicial Committee concurred with the view of the High Court that it is open to a pleader to abandon an issue relating to the impartibility of a Zemindari. It was argued that this decision will not enable a pleader to give up a question of law. It cannot be said that the point conceded before the District Judge related to a pure question of law. In his affidavit, the appellant had admitted his liability to account for the profits during the period he was in possession; and the pleader was within his rights in following up this admission by consenting to the appointment of a commissioner. *Rama Iyengar* v. *Mannar Iyen* [4] only deals with an erroneous admission that a question of law was unarguable. See also *Narayan* v. *Venkatacharya* [5]. These do not affect the present case. However, having regard to the fact that the admission was withdrawn soon after, we do not wish to base our Judgment on the consent alone.

The main point for decision is, whether the fact that the receipt of the income from the property has not been certified to

1. (1892) I.L.R. 19 C 312 (P.C.) 2. (1914) L.R. 41 I.A. 84 s.c. 26 M.L.J. 474.
3. (1902) I.L.R 25 M. 367 (P.C.) 4. (1912) 23 M. L. J. 327.
5. (1904) I. L. R. 28 B. 408 at 412.

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the court by the decree-holder, prevents the Judge from directing an enquiry into the amount realised. There are two provisions in the Code of Civil Procedure relating to this matter, S. 21, r. 2 and 1. The first of these rules deals with certifying to the court and the latter with the contents of the application for execution. Rule 2 is an enabling provision. Rule 11 clause (e) imposes a duty on the decree-holder to state to the court whether any payment or other adjustment has been made. It was contended that whereas the right given to the judgment-debtor to apply within a specified period for certifying the payment or adjustment may necessitate an enquiry, when the decree-holder certifies the court has to act solely on his representation and any enquiry, regarding the amount of the payment or adjustment is not within the competency of the court. We are not prepared to place such a restricted construction upon the powers of the court. We fail to see why the arithmetic of the payment or adjustment is beyond the court's jurisdiction. We cannot accede to the contention that when the manner of payment or adjustment has been notified, the court has no power to ascertain to what extent the decree has been satisfied. To take a concrete case; suppose a decree-holder informs the court that he desires that the judgment-debtor should be credited with the balance that may be found in his favour after taking account of a mutual and current account between the parties, we see no reason for holding that the court is powerless to order an enquiry regarding the amount. The phrase "adjustment in whole or in part" suggests that the court is not confined to merely entering the figures supplied by the decree-holder. The further question for consideration is whether the decree-holder has certified any such adjustment to the court. No particular words are necessary for this purpose. See *Saadoollah Shaik* v. *Kalee Churn* [1], *Alathoor Badruddin* v. *Gulam Mohideen* [2]. *Ramayyar* v. *Ramayyar* [3], and *Lakshmi Narain* v. *Felamani Dasi* [4]. Two statements made by the decree-holder are relied on. In the execution application No. 145 of 1905 presented by him, he says "this and a small amount collected by the plaintiff himself from the tenants have been appropriated towards the expenses of the management to which the plaintiff is entitled." Then in the affidavit which he was called upon to submit prior to the settlement of the procla-

1. (1869) 12 W. R. 368.
2. (1911) M. W. N. 478.
3. (1897) I. L. R. 21 M. 356.
4. (1914) 20 C. L. J. 131.

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mation of sale, he stated " the amount for the recovery of which the sale was ordered is Rs. 23,11,183 on the 29th March 1903, with further interest to be added. Accordingly, with further interest up to 29th September 1909, deducting the amount of net rents paid to me by the Court of Wards the total amount comes to Rs. 29,05,187-1-11. Credit will be given for the net income received by me up to the date of final settlement of accounts in execution proceedings. I may be permitted to add the amount of expenditure incurred over and above the net income received by me during the course of management of the said Narayanavanam taluq." Mr. Rangachariar argued that the last clause of the paragraph is an intimation that there was no surplus income. We cannot accept this construction. The paragraph opens with a statement that "the net revenue available after deducting the peishcush and the land cess" will be about Rs. 97,500. In the middle of the paragraph, it is said that "credit will be given for the net income." The last clause is only a suggestion that if in the calculation of the net income, the decree-holder had omitted to give himself credit for any legitimate expenses incurred by him in the course of the management, he would submit a statement for making deductions in that behalf. To read the clause as the learned vakil wants us to do, will render the whole paragaph meaningless. We are of opinion that in this paragraph the decree-holder distinctly intimated to the court that credit will be given for the amounts received as net profits during the years that he was in possession. It was next contended that the affidavit only provided that "credit will be given to the net income received up to date;" and such language is not equivalent to asking the court to certify the adjustment. The affidavit was filed with a view to enable the court to fix the amount to be entered in the sale proclamation. The plaintiff clearly wanted the court to apply its mind to the figure that should be so entered. It is not suggested in what other proceeding this credit was intended to be given by the decree-holder. We are of opinion that these words were intended to inform the Court that the decree must be taken to have been satisfied to the extent of the net income received by the decree-holder. We must therefore hold that the decree-holder intended to certify adjustment by his affidavit, that it is competent to the Court to enquire into the quantum of this adjustment and that the appointment of a Commissioner for this purpose was justifiable.

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There is one other aspect of the case which leads to the same conclusion. Under O. 21, r. 11, the decree-holder is bound to inform the Court of any adjustment or payment that has been made. It was held in *Ramayyar* v. *Ramayyar* [1] that if the decree-holder fraudulently keeps back information in this respect the executing Court will have power to order an enquiry. In *Paupayya and Subbayya* v. *Narasamma and K. Subbayya* [2], it was held that even apart from fraud, the Court can determine whether any adjustment has been made. In neither of these cases, the effect of r. 2 upon r. 11 (S. 235 or S. 258) were considered. The cardinal principle no doubt is to see that neither party over reaches the other. But where no intimation is conveyed by the decree-holder it is doubtful whether the Court can start an enquiry on the ground that the decree-holder should have certified payment or adjustment. The better view seems to be that in all cases where the Court is seized of the question either from intimation conveyed by the decree-holder at any time before orders are passed or from the judgment-debtor within the prescribed period, the Court will be bound to enquire into the truth or correctness of the statement made. This view would give effect to the imperative provision in r. 11, clause (e) and to the permissive provision in r. 2. In the present case, the decree-holder did say in the petition for execution that monies have been received, but he coupled it with an assertion that it has been appropriated towards the expenses of the management. The truth of this assertion is a legitimate subject for enquiry. The decision in *Tukaram* v. *Babaji* [3] is very analogous to the present case. In that case, the decree-holder relied on uncertified payments to save limitation and the judgment-debtor denied them and pleaded that execution was barred. The Court held that it had power to direct an enquiry. If the truth of an assertion of an adjustment can be enquired into for the purpose of saving limitation, we fail to see why the same principle should not be extended to ascertain the exact amount for which credit should be given to the judgment-debtor. See also *Roshan Singh* v. *Mata Din* [4]. *Fateh Muhammad* v. *Gopal Das* [5] was strongly relied upon by the learned Vakil for the appellant. It only lays down that where an arrangement by which a decree is adjusted is not certified, the executing Court should not

1. (1897) I. L. R. 21 M. 356. 2. (1880) I. L. R. 2 M. 216.
3. (1895) I.L.R. 21 B. 122. 4. (1903) I.L.R. 26 A. 36.
5. (1885) I.L.R. 7 A. 424.

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recognise it. There are observations in that judgment which are not reconcilable with recent decisions which place a more liberal construction on the manner of certifying. In *Trimbak Ramkrishna* v. *Hari Laxman* [1] the question was whether a decree-holder who received monies outside the Court without certifying was estopped from pleading that they should not be recognised as adjustments. We agree with Mr. Justice Heaton that S. 258 (R. 2 of O. XXI) should be so construed as not to defeat justice. In *Kushal Chand* v. *Nandram Saheram* [2] the learned Judges of whom Mr. Justice Chandavarkar who took part in the decision in *Trimbak Ramkrishna* v. *Hari Laxman* [1] was one inclined to the view that a mere intimation of adjustment is equivalent to certifying. *Jogendra* v. *Probathnath Chatterjee* follows the view taken by Mr. Justice Chandavarkar in *Trimbak Ramkrishna* v. *Hari Laxman* [1]. These decisions do not compel us to hold that where a statement has been made in the execution petition that a certain payment was made, it is not within the province of the Court to enquire whether the mode of appropriation suggested in it is true or not. Our conclusion is that the District Judge was right in appointing a Commissioner to ascertain to what extent the profits received by the appellant and referred to by him in his petition should be applied towards the amount of the decree. The decree-holder in applying for an order absolute left the question of the amount due open.

Mr. Govindaraghava Aiyar has raised a further contention that as the decree-holder has agreed to give credit to the income from the mortgaged property in execution and as the judgment-debtor did not object to this course the appellant should not be allowed to invoke the aid of O. XXI, R. 2. Mr. Rangachariar's reply to this is that as there can be no estoppel against a plain provision of the law, the decree-holder is not precluded from pleading that his assent does not bind him; and he relies upon 19 C. L. J. 126, I. L. R. 34 B. 575 and *Kamma Somakka* v. *Pedda Ramiah* [4]. There has been a tendency in recent years to push this doctrine too far. The principle is that parties should not be permitted by an arrangement between themselves to commit an illegality. The right should not be extended to cases which have the effect of enabling parties to make a law for themselves in violation of the law of the land. But where such a result will not follow, there is nothing to prevent the application of the

1. (1910) I.L.R. 34 B. 575.
2. (1911) I. L. R. 35 B. 516.
3. (1914) 19 C. L. J. 126.
4. (1912) 22 M. L. J. 193.

provisions of S. 115 of the Evidence Act to agreements between the parties. There is nothing opposed to public policy or illegal in parties stipulating that a certain sum of money which is recoverable as between themselves in a regular suit should be adjusted in execution proceedings. The accountability arose after decree. It was between the parties to the suit and in respect of the subject-matter of the litigation. Cl. 2 of S. 47 of the Code of Civil Procedure shows that an arrangement of the kind we have referred to is not obnoxious to legal procedure. The decision of the Judicial Committee in *Sadasiva Pillai* v. *Ramalinga Pillai* [1], supports this view. Mr. Rangachariar distinguishes this case on the ground that the sanction of the Court was given in that case to the mode of enforcing the claim. Although that distinction is well founded, we think that its extension to cases like the present will not be unwarranted especially as the Code is in favour of treating applications as suits. S. 47, cl. 2. See *Muhammad Sulaiman* v. *Jhukkilal* [2], *Lakshmana* v. *Sukiya Bai* [3], *Kondagi Bagai* v. *Anau* [4]. Moreover, in the present case after the filing of the application by the decree-holder in which he referred to the receipt of income from the mortgaged property which he alleged he applied in a particular manner, the Court took action, on it by issuing notices to the judgment-debtor. The Court by these orders must be deemed to have sanctioned the proposal of the decree-holder to give credit in execution proceedings to monies which he is bound to account for in a regular suit. See also the observations of the Judicial Committee in *Muhamad Musa* v. *Aghore Kamar Ganguli* [5].

The decisions in *Appa Rao* v. *Krishna Iyengar* [6] *Vaidhinadasamy Aiyar* v. *Somasundaram Pillai* [7] and *Ramasami Naik* v. *Ramasami Chetti* [8] relied on by Mr. Srinivasa Aiyangar do not affect the question. If the respondent in this case contended that receipts as mortgagee ought to be regarded as payments to the decree-holder, these decisions will be in appellant's favour. We are not deciding this case on that ground. We hold that the decree-holder has certified, that he has informed the Court of an adjustment and that he is not entitled to say that payments received by him are accountable by him only in a regular suit. The decision of the District Judge is right for the reason mentioned by us. We dismiss the appeals with costs of the sole respondent in C. M. A. 236.

1. (1875) 2 I. A. 219.
2. (1888) I. L. R. 11 A. 228.
3. (1884) I. L. R. 7 M. 400.
4. (1883) I. L. R. 7 B. 448.
5. (1914) 28 M. L. J. 543. (P.C.)
6. (1901) I. L. R. 25 M. 537.
7. (1904) I. L. R. 28 M. 473.
8. (1906) I. L. R. 30 M. 255.

The Commissioner will take accounts from the 1st July 1907 up to the 30th of June 1915. Credit will be given for the amount reported by the Commissioner to the judgment-debtor and the sale proclamation the decree amount *minus* other amount will be entered. The judgment-debtor can pursue his ordinary resources regarding the amount that may become due after the 1st of July, 1915.

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IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Seshagiri Ayyar and Mr. Justice Napier.

Rangaswami Aiyangar and another ... *Appellants* * *(Defendants).*

v.

Sowri Aiyangar ... *Respondent (Plaintiff).*

Rangaswami Aiyangar v. Sowri Aiyangar.

Evidence Act I of 1872, S. 92 proviso (1)—Oral evidence to vary the terms of a sale-deed—Entry of wrong survey number—Fraud or mistake—Right of vendee to adduce oral evidence to prove mistake—Specific Relief Act, S. 31.

Where in a suit to recover possession on the ground that the plaintiff purchased the property from the owners in 1911 and the defendant was in wrongful possession of it, the defendant pleaded that the same vendors conveyed to him the property in dispute in 1908 and though the conveyance in his favour described the land as survey No. 90-B. his vendors intended to sell and he intended to purchase only survey No. 92-B.

Held, that having regard to S. 92, Cl. (1) of the Evidence Act, the defence was open to the defendant being one of mistake entitling the defendant to rectification of the deed and a separate suit for the purpose was not necessary.

Second appeal from the decree of the Court of the Temporary Subordinate Judge of Tanjore in A. S. No. 464 of 1913 preferred against the decree of the Court of the District Munsif of Tiruvalur in O. S. No. 73 of 1912.

K. Parthasarathy Aiyengar for appellant.

T. Narasimha Aiyengar for respondent.

The Court delivered the following

Judgment:—This is a suit to recover possession. Plaintiff's case was that he purchased survey No. 92-B. from the owners in April 1911 and that the defendant is wrongfully in possession of it. The defendant pleaded that the same vendors conveyed to him the property in dispute in 1908 and that although the conveyance (Exhibit II) describes the land sold as survey No. 90-B, his vendors intended to sell and he intended to purchase only survey No. 92-B. He also alleged that he was put in possession of this latter number under the sale-deed.

The issue raised in the case was whether it was survey No. 90-B or 92-B, that was sold to the defendant. The Munsif

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* S. A. No. 803 of 1914. 30th April 1915.

Rangaswami Aiyangar v. Sowri Aiyangar.

agreed with the defendant's contention and dismissed the suit. In appeal, the Subordinate Judge held that evidence to prove that what was described in the document was not what was actually sold was inadmissible under S. 92 of the Evidence Act and decreed the plaintiff's claim.

We think the Subordinate Judge is wrong. The written statement clearly sets up a case of mistake in the description of the property sold. There can be no doubt that on the allegations contained in the written statement the defendant would be entitled to claim rectification of his sale-deed under S. 31 of the Specific Relief Act. Under S. 92, cl. (*a*), any fact may be proved which would entitle any person to any decree on the ground of "mistake of fact or law". Thus, it is clear that if he went to Court as plaintiff, the defendant could have claimed relief by way of injunction against the plaintiff from interfering with his possession and to have his sale-deed rectified. Does the fact that the defendant is resisting the plaintiff's claim disable him from setting up the plea which could have availed him as plaintiff? We think not. We find nothing in the language of S. 92, cl. (1) which indicates that its benefit can be invoked by the plaintiff. In *Mahendra Nath Mukerjee* v. *Jogendra Nath Roy Chowdhry* [1], it was held that the defendant can protect himself by such a plea. See *Dagdu* v. *Bhana* [2]. In this Court it was decided in *Karuppa Goundan* alias *Thoppala Goundan* v. *Periathambi Goundan* [3], and *Mahadeva Aiyar* v. *Gopala Aiyar* [4], that a plaintiff can sue to recover the right property notwithstanding misdescription in his document of title. Reliance was placed in these two cases on the proviso to S. 92. None of these cases have been considered by the Subordinate Judge. It is true that S. 94 has no application as pointed out by him, but the combined effect of S. 92, cl. (1) and of S. 31 of the Specific Relief Act leaves no room for doubt that the defendant can resist the suit on the ground that what was sold to him was different from what the document described.

Mr. Narasimha Aiyangar contends that on the facts he will be able to show that there was no mistake. We must reverse the decree of the Subordinate Judge and remand the appeal for disposal on the merits. Costs to abide the result.

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1. (1897) 2 C. W. N. 260.
2. (1904) I. L. R. 28 B. 420.
3. (1907) I. L. R. 30 M. 397.
4. (1910) I. L. R. 34 M. 51.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Sir John Edward Power Wallis, Kt., Chief Justice and Mr. Justice Seshagiri Aiyar.

Maddala Bagavannarayana and another . . *Appellants* * *in all (Plaintiffs).*

v.

Vadapalli Perumallacharyulu (Deceased) and others. *Respondents (Defendants).*

Maddala Bagavannarayana v. Vadapalli Perumallacharyulu.

Civil Procedure Code, S. 92.—Suit under—Sanction given to more than two persons—Suit by two, if maintainable.

Where sanction is given under S. 92 of the Civil Procedure Code to more than two persons, two of them alone cannot sue.

Appeals against the decrees of the Court of the Subordinate Judge of Kistna at Ellore, in O. S. Nos. 84, 86 and 87 of 1910.

Four individuals obtained the sanction of the District Collector under S. 92 C.P.C., for suing the defendants for various reliefs under that section. Two of the above four alone brought the suit alleging that the other two had been gained over by the defendants and that they refused to join in the suit. The defendants contended that the sanction given by the Collector was to four named individuals as a whole and that two alone of them could not sue without obtaining a fresh sanction in their names. The Lower Court while observing that there was reason to suppose that the defendants had won over the two who did not join in the suit, nevertheless held that the other two alone cannot sue without obtaining a fresh sanction from the District Collector.

The Plaintiffs appealed.

B. Somayya for *P. Narayanamurti* for appellants.

S. 92 of the Civil Procedure Code requires at least two persons who have obtained sanction. The plaintiffs in this case fulfil that description. Plaintiff's right of suit under S. 92 is not taken away merely because others who have obtained sanction refuse to join them in the suit. There is nothing in the language of S. 92 to lead to that conclusion. So long as there are at least two persons who have obtained sanction the suit is maintainable. Once a sanction is obtained, it is not necessary that all those who obtained the sanction should conduct the suit right up to the end.

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* A. S. Nos. 144 to 146 of 1912. 23rd March 1915.

Maddala Bagavannarayana v. Vadapalli Perumallacharyulu.

See *Mahomed Athar* v. *Ramjan Khan* [1], *Venkatesa Malliah* v. *Bamanpalli Ramayya* [2], was a case under the Religious Endowments Act. No reasons are given in support of the decision. *Srinivasa* v. *Venkata* [3], which is relied on in *Venkatesa Malliah* v. *Ramayya* [2], does not touch the present question. There the plaintiffs abandoned a relief against the trust though the sanction authorised such relief Here the plaintiffs are trying to carry out the purpose of the sanction. The suit as brought is maintainable. See *Jafar Khan* v. *Land Shah* [4].

V. Ramesam (with him) *B. N. Sarma*, for respondents.

The language of S. 92, Civil Procedure Code, is in my favour. In S. 18 of the Religious Endowments Act, there is no reference to "person" or "persons" as in S. 92. Even under S. 18 of the Religious Endowments Act, all those who obtain the sanction must sue. *Venkatesa Malliah* v. *Ramayya* [2]. The sanction given under S. 92 of the Civil Procedure Code, is not a joint and several sanction: It is given to several persons as a body. Otherwise if 6 persons obtain the sanction and any two of them can sue under it, there will be a multiplicity of suits. The object of S. 92, Civil Procedure Code, which is to prevent trustees from being harassed by vexatious litigation, will be defeated, if the contention of the other side is to prevail. The absence of a similar provision in Lord Romilly's Act, shows that the policy of the Indian Legislature was to impose some restriction on this class of suits. Besides this, the reasoning of *Sankaran Nair, J.*, in *Venkatesa Malliah* v *Ramayya* [2], is in favour of my contention. S. 92 should be strictly construed. See *Saiyad Husain Miyan* v. *Collector of Khaira* [5].

The Court delivered the following

Judgment:—Section 92 of the Code of Civil Procedure provides that "two or more persons having an interest in the trust and having obtained the consent in writing of the Advocate-General" may institute a suit under that section. The question is whether when more than two persons interested in the trust have obtained the necessary consent, any two of them may sue without the others. We think the language used shows that the persons authorised to sue are all the persons to whom the consent

1. (1907) I. L. R. 34 C. 587
2. (1914) 27 M. L. J. 241 at p. 243.
3. (1887) I. L. R. 11 M. 148.
4. (1910) 13 Bom. L. R. 49.
5. (1896) I. L. R. 21 B. 257.

has been given and not any two of them. On the opposite contention, there might be competition between the various persons authorised as to who should sue. Besides, the provision for giving consent to two or more persons shows that the legislature considered that in some cases it might not be desirable for only two to sue.

Maddala Bagavannarayana v. Vadapalli Perumallacharyulu.

In this connection it is worth mentioning that Romilly's Act, upon which this section was founded, enabled any two persons interested to apply, and that here the Legislature has empowered any two or more persons with the consent of the Advocate-General. The appeals are dismissed with costs. The memorandum of objections in Appeal No. 14[illegible] of 1912 is dismissed with costs.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Mr. Justice Sadasiva Aiyar and Mr. Justice Hannay.

Somiammal ... Plaintiff (*Appellant*).

v.

Vellaya Sethurayan (*Deceased*) and others. Defendants (*Respondents.*)

Somiammal v. Vellaya Sethurayan.

Ejectment Suit—Maintainability—Defendant, a trespasser—Lease by landlord outstanding at time of suit—Effect—Practice—Appeal—Allowing new point in—Legality.

There is no inflexible rule of law that a trespasser can refuse to give up possession to a plaintiff simply because a third party may be entitled to possession against him (the plaintiff).

Ambalavana Chetty v. *Singaravelu Udayar* [1] *Narayanaswami Naidu Garu* v. *Yerramalli Ramakrishnayya* [2] *Bisseswri Dabeea* v. *Baroda Kanta Roy Chowdry* [3] *Sarat Chandra Sinha* v. *Nritya Gopal Biswas* [4] followed.

Held, a landlord, though he has given a lease to a third person is entitled for the purpose of putting his lessee in possession to maintain a suit to eject a trespasser. The defendant in such a suit can succeed only if he shows that the plaintiff or his lessee has no right to possession because the defendant is himself entitled to possession either through a title paramount to the plaintiff or derived from the plaintiff or his lessee, or because the lessee is unwilling that the plaintiff should get possession during the term of the lease.

Ramanadan Chetty v. *Pulikutti Servai* [5] distinguished.

The Zemindar of Vizianagram v. *Behara Suryanarayana Pantulu* [6] referred to.

Per Hannay, J.—The Appellate Court ought not to allow a party to rely upon a point which was not raised in the Court of First Instance and which requires an investigation into facts.

S. A. 130 of 1912. 9th November 1914.

1. (1912) M. W. N. 669 (680).
2. (1910) I. L. R. 33 M. 499.
3. (1884) I. L. R. 10 C. 1076.
4. (1910) 13 C. L. J. 284.
5. (1898) I. L. R. 21 M. 288.
6. (1901) I.L.R. 25 M. 587 (597).

Somiammal v. Vellaya Sethurayan.

Hannay, J.

Second appeal from the decree of the District Court of Madura in A. S. No. 85 of 1911, preferred against the decree of the Court of the District Munsif of Dindigul, in O. S. No. 666 of 1908.

T. R. Krishnaswami Aiyar and *K. B. Ranganatha Aiyar* for appellant.

C. V. Ananthakrishna Aiyar for respondent.

The Court delivered the following

Judgment :—*Hannay, J.*:—The plaintiff sued for a declaration that the suit lands belonged to her and for recovery of possession from the defendants. The District Munsif gave plaintiff a decree as prayed, but on appeal by the 1st defendant the District Judge dismissed the suit on the ground that at the date of suit the plaintiff was not entitled to possession, as there was at that time a lease admittedly outstanding in favour of plaintiff's 2nd witness. The District Judge relied upon the decision in *Ramanadhan Chetty* v. *Pulikutti Servai* [1]. In appeal before us, it is urged that the plaintiff has not admitted that there was an outstanding lease at the date of suit, that the lower Appellate Court ought not to have dismissed the suit on a point not raised by the defendants either in the written statement or at the trial and that even if there was an outstanding lease in favour of plaintiff's 2nd witness, plaintiff was still entitled to recover possession. There is in fact no admission by the plaintiff in this case, that the lease which she says she granted to her 2nd witness was subsisting at the date of suit. We agree with the contention that the 1st defendant ought not to have been allowed to rely in appeal for the first time on a point not raised before the District Munsif which required an investigation into facts, but which the plaintiff had not had an opportunity of meeting by adducing evidence. With reference to the 3rd ground above mentioned the decision in *Ramanathan Chetty* v. *Pulikutti Servai* [1], was relied upon by the lower Appellate Court. That decision may be distinguished from the facts of the present case on the ground that it was a case where the tenant had been ousted by a trespasser after having been placed in possession and was apparently unwilling that the landlord should recover possession as he was colluding with the trespasser, whereas in the present case (assuming for the purpose of the argument that the lease to plaintiff's 2nd witness was subsisting at the time of suit) the

1. (1898) I. L. R. 21 M. 288.

Somiammal v. Vellaya Sethurayan. Hannay, J.

tenant had not been put in possession at all, but was anxious to obtain possession. The evidence of plaintiff's 2nd witness, Parameswara Aiyar, is clear on that matter. In these circumstances, the plaintiff's tenant was entitled to require the plaintiff to place him in possession by virtue of section 108 (b) of the Transfer of Property Act, and the case of the *Zamindar of Vizianagaram* v. *Behara Suryanarayana Pantulu* [1] is authority for the proposition that a registered lease like that in the present case (Ex. B) operates in the absence of a contract to the contrary as an executory contract to deliver to the lessee such possession as the nature of the property admits for breach of which contract the plaintiff would be liable for damages to the lessee. In these circumstances, I think it was open to the landlord (plaintiff) to sue the trespassers in this case to recover possession notwithstanding the existence of the lease, Exhibit B, if for no other reason than to escape liability for such damages. The observations of Sundara Iyer, J., in the case of *Ambalavana Chetty* v. *Singaravelu Udayar* [2] and of Abdur Rahim, J., in the case of *Narayanaswami Naidu Garu* v. *Yerramalli Ramakrishnayya* [3] support generally the view that such a suit as the present is maintainable. In the former case Sundara Iyer, J., after citing *Bisseswari Debia* v. *Barad Kanta Roy Chowdhry* [4] and *Sarat Chandra Sinha* v. *Nritya Gopal Biswas* [5] as authorities for the view that a landlord can claim against a trespasser that possession should be given to his tenant observed that there is no inflexible rule of law that a trespasser can refuse to give up possession to a plaintiff simply because a third party may be entitled to possession as against him (the plaintiff). In the latter case Abdur Rahim, J., was inclined to the view that if the land is already in the possession of a third person to the knowledge of the lessor and lessee, it would be the duty of the lessor to make it possible for the lessee to take possession by removing the third party from possession thereof, even though no express request is made by the lessee. In these views I concur.

On all these grounds therefore I think this appeal must be allowed. I would set aside the decree of the Lower Appellate Court and remand the appeal for disposal upon the issues already framed. I would order costs to abide the result.

1. (1901) I.L.R. 25 M. 587 at 597=12 M.L. J. 249.
2. (1912) M. W. N. 669 at 680.
3. (1910) I. L. R. 33 M. 499 at 50.
4. (1884) I. L. R. 10 C. 1076.
5. (1910) 13 C.L. J. 281.

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Sadasiva Aiyar, J.:—I agree that the case should be remanded to the Lower Appellate Court for the reasons given by my learned brother for holding that a landlord though he has given a lease to a third person, is entitled for the purpose of putting his lessee in possession, to maintain a suit to eject a trespasser. I have nothing to add to those reasons. The plaintiff's right to eject the defendant cannot, in my opinion, be defeated simply because the plaintiff does not disclose in his plaint the fact that a lessee from him is entitled to get possession from him, or the fact that the purpose of his suit is to put such lessee in possession. The defendant can succeed only if he shows that the plaintiff or his lessee has no right to possession because the defendant is himself entitled to possession either through a title paramount to the plaintiff or derived from the plaintiff or his lessee or that the lessee is unwilling that the plaintiff should get possession during the term of the lease. I do not think that the general expressions in some of the cases quoted by the respondent's vakil to the effect that the plaintiff to succeed in a suit in ejectment must show his present right to possession on the date of suit are inconsistent with the above views, when read in the light of the facts of those particular cases.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Sir John Edward Power Wallis, Kt., Chief Justice and Mr. Justice Seshagiri Aiyar.

Sundarammal *alias* Sowbhagiammal. *Appellant * (2nd Defendant and the legal representative of the deceased 1st defendant).*

v.

V. Subramania Chettiar (*Deceased*) and others. *Respondents (Plaintiff and his legal representatives).*

Sundarammal alias Sowbhagiammal v. Subramania Chettiar.

Negotiable Instruments Act (XXVI of 1881), S. 118 (a)—Negotiable Instrument—Consideration for—Presumption—Executant, a young man of extravagant habits and out of possession—Effect—Evidence Act, S. 114, ill. (c) and explanation to illustration (c).

Where, in a suit upon three promissory notes executed by the 1st defendant, (who died pending the suit leaving his widow, a young woman as his representative), it appeared that the notes were executed within a short time of each other, that the defendant was only 21 years of age when he executed the notes, that he was a man of considerable property but at the time out of possession, the properties being

* A. S. 251 of 1912. 15th December 1914.

in the management of his elder brother and that he was a man of extravagant habits and it also appeared that the plaintiff had not the means to make the alleged advances.

Held, that these circumstances were sufficient to shift the onus on to the plaintiff to make out that full consideration was paid as alleged by him. *Moti Gulab Chand* v. *Mahomed Taria Topan* [1], followed.

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The Chief Justice.

Appeal from the decree of the Court of the Subordinate Judge of North Arcot in O. S. No. 65 of 1911 (O. S. No. 4 of 1909 on the file of the District Court of Salem).

K. Srinivasa Aiyengar and *C. A. Seshagiri Sastri* for the Appellant.

L. A. Venkata Raghava Aiyar for *L. A. Govinda Raghava Aiyar* for the Respondent.

The Court delivered the following

Judgments :—*The Chief Justice.*—This is an appeal from the decision of the Subordinate Judge of North Arcot giving judgment for the plaintiff in a suit on three promissory notes which were executed by the 1st defendant who died before the trial. The Subordinate Judge has written a very careful judgment, and I do not find it necessary to dissent from any of the conclusions of fact at which he has arrived. He has decided the case on the ground that under the Negotiable Instruments Act, the burden is on the representative of the 1st defendant to show failure of consideration in whole or in part and he has observed in the course of his judgment that but for the burden of proof being this way he would probably on account of the suspicious circumstances of the various transactions to which he refers, have decided the suit against the plaintiff except to the extent of the consideration admitted by the 1st defendant in his written statement. Farran, C.J. in *Moti Gulabchand* v. *Mahomed Tharia Topan* [1], held that the fact that the defendant in that case was a young man of extravagant habits who was kept out of the enjoyment of his property which was in the hands of a receiver was sufficient to throw the burden on to the plaintiff. It appears to me that the facts of the present case are very much stronger than the facts in *Moti Gulabchand* v. *Mahomed Mehdi Tharia Topan* [1] and that they have that effect. The 1st defendant was a young man of extravagant habits, who, though, as the Subordinate Judge finds, he was supplied by his family with abundant means for his maintenance,

1. (1894) I. L. R. 20 B. 357.

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borrowed in a very extravagant manner both from the present plaintiff and from others after he came of age, so that his elder brother was obliged to sue for partition. All the transactions in this suit took place before the 1st defendant obtained his share of the property on partition. The transactions with the present plaintiff fall under the three heads. In the year 1906, the 1st defendant borrowed over Rs. 1,600 from the plaintiff and afterwards denied receipt of consideration. This put a stop to the transactions between the parties for sometime. But in 1908 they were resumed, and between March 1908 and May 1908 the 1st defendant is said to have borrowed from the plaintiff a sum of over Rs. 5,000 on promissory notes which have been made the subject of separate suits. Lastly, we come to the plaint transactions three promissory notes for Rs. 3,000, Rs. 3,400 and Rs. 3,000 which are said to have been borrowed in June, August and November 1908. So that between March and November 1908, the 1st defendant is said to have borrowed more than Rs. 15,000 from the plaintiff.

The Subordinate Judge has enumerated the various suspicious circumstances which attended these transactions, and I think it only necessary to refer to one or two of them as sufficient to shift the burden. The Subordinate Judge finds that the plaintiff has not means to make the advances shown in his accounts to the 1st defendant and his other clients. According to the plaintiff's own evidence his transactions with other clients were on a very small scale. He says that their total indebtedness to him was Rs. 3,000, whereas he purports to have made advances of no less than Rs. 15,000 in the course of these few months to the 1st defendant. The Subordinate Judge finds, and I agree with him, that the plaintiff's accounts do not show that he had enough money to make such advances. It is of course possible that these accounts may not fully represent his transactions and may have been prepared for the purpose of deceiving the income-tax authorities. In the course of cross-examination the plaintiff set up various false cases as to how he got the money. One absurd story he told was that he had sold all his wife's jewels for the purpose of getting money to make these advances to the 1st defendant. I think that is quite incredible. I do not believe the allegation of the 1st defendant in his written statement as to what he received on these promissory notes. On the other hand,

I am equally far from believing that the plaintiff really advanced the whole of these amounts as he says. It seems to me that where the relation is such as that which existed between the plaintiff and the 1st defendant very little is needed to shift the burden.

The other evidence is fully dealt with by my learned brother in his written judgment, and it is sufficient for me to say the effect of that evidence is to shift the burden which was on the defendant to show that the full consideration of the promissory notes has not been paid, and that being so, judgment can only be given for the amounts which are admitted to have been received by the 1st defendant. The appeal must therefore, be allowed and the decree will be modified accordingly with costs throughout.

Seshagiri Aiyar, J.:—I have come to the same conclusion. The plaintiff sues on three promissory notes, Exhibits A, A 1, and A 2 executed by the 1st defendant on the 4th June 1908, 20th August 1908 and 11th November 1908 respectively. The 1st defendant pleaded that excepting small sums of money paid on the occasion of the registration of each of the three promissory notes, there was no consideration for them. He died pending the suit and before evidence was gone into. His widow has been brought on the record as his legal representative. The Subordinate Judge, in a very careful judgment in which he draws attention to all the salient features of the case, came to the conclusion that the burden of proof was upon the defendants and that it was never shifted on to the plaintiff, and upon that ground alone, although he was of opinion that there were many suspicious circumstances connected with the execution of the promissory notes, he gave a decree for the plaintiff as prayed for. The widow of the 1st defendant has appealed. I am unable to agree with the Subordinate Judge that in the circumstances of this case to which I shall presently refer that the burden of proof was not shifted to the plaintiff.

The father of the 1st defendant died in 1900 leaving behind him the 1st defendant who was then a minor and another son the stepbrother of the 1st defendant. He died possessed of considerable property and on his death their management passed into the hands of the 1st defendant's stepbrother who was older in years. While the stepbrother was managing the 1st defendant Appavu Chetty began to contract debts. The first transaction

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was about September 1906 when a promissory note was executed by Appavu for Rs. 2,000 in favour of the plaintiff in consideration of the latter transferring a deed of mortgage executed to him by a third party. No explanation has been given as to why Appavu was saddled with the collection of a mortgage-debt and why he gave a promissory note in exchange. The mortgage which was transferred was for Rs. 1,200 and it was suggested that at the time of the promissory note, probably the amount of the principal and interest due on the mortgage amounted to Rs. 2,000 The deed itself has not been put in evidence. This is a very suspicious circumstance. The next promissory note was executed by Appavu to plaintiff on the 28th October 1906 for Rs. 476 carrying interest at 18 per cent. per annum. Three days later, on the 1st November 1906, a third promissory note for Rs. 200 was given. Eight days after. a fourth for Rs. 450, and after three weeks, on the 2nd December 1906 a fifth promissory note for Rs. 500 was executed, all bearing interest at 18 per cent. per annum. On the 4th January 1907 Appavu sent a registered notice, Exhibit R, through his vakil to the effect that full consideration was not paid in respect of the fourth and fifth promissory notes and that he would not be liable for their payment. To this, a reply Exhibit R1, was given on the very next day, saying that the contents of the notice were "highly surprising, fraudulent and shocking.'. The notice went on to say: Further, you should pay me within 31st January 1907, the amount of the principal and interest due on the abovesaid (5) five promissory notes which you have executed in my favour, endorse payments on the respective bonds and obtain return of those. If you do not do so, suit will be filed at once in Civil Court and the amounts recovered with costs." In or about September 1907. the elder brother of Appavu filed a suit against the plaintiff for partition of the family properties, the apparent object being to relieve himself from liability for the debts which Appavu was recklessly contracting at this time. The suit itself terminated in a compromise, Exhibit IX, on the 15th October 1909. During the pendency of this suit, 1st defendant began to borrow further sums of money from the plaintiff. The borrowings are preceded by an abject apology, Exhibit S., dated the 14th March 1909 for having given the notice Exhibit R. Then on that very day, a promissory note for Rs. 675 was execu-

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ted by the 1st defendant to the plaintiff. Four days after, on the 18th March, a promissory note for Rs. 2,175 was executed. Twenty days after on the 10th April 1908, another for Rs. 2,000 was executed. Then we come to the suit promissory notes. The first of them was on the 4th June 1908 for Rs. 3,000, the second was on the 20th August 1908 for Rs. 3,400; and the third was on the 11th November 1908 for Rs. 3,000. These promissory notes following in quick succession naturally create a great deal of suspicion. It has to be remembered that, even according to the evidence of the plaintiff 1st defendant Appavu was 21 years of age in 1908. When he began his borrowings in 1906 he had just emerged from his minority. He was a man of large expectations and was out of possession, because the management of the properties was in the hands of his brother. These circumstances, in my opinion, shift the burden of proof on to the plaintiff, and the facts that the executant is dead and that the plaintiff now seeks to recover the amount from a young woman, who admittedly has no knowledge of the circumstances under which the promissory notes were executed make it more incumbent upon the plaintiff to prove that there was consideration for the promissory notes sued on. In *Moti Gulabchand* v. *Mahomed Mehdi Tharia Topan* [1] Sir Charles Farran, Chief Justice, says :—'The defendant, when he executed the notes sued upon, was a young man who had only attained his majority nine months previously. He appears to have been of an extravagant and reckless character. He was entitled to a large amount of property under the will of his father, the late Sir Tharia Topan of Zanzibar, but had not come into possession of it, as on account of family disputes it was, in common with the rest of the family estate, in the hands of a receiver appointed by this Court. The plaintiffs are a Marwadi firm who are by profession money-lenders. These facts being admitted (apart from the technical rule laid down in S. 118 of the Negotiable Instruments Act) the ordinary presumption that a Negotiable instrument has been executed for value is so much weakened, that the allegation of the young man that he has not received full consideration is sufficient to shift the burden of proof and to throw upon the money-lender the obligation of satisfying the Court that he has paid the consideration in full.

1. (1894) I. L. R. 20 B. 367.

This is, we think, the practical effect of illustration (c) to S. 114 of the Evidence Act, and its explanation." In the present case also the plaintiff is a money-lender. It is also in evidence that Appavu was a man of reckless character and was leading a wasteful life. He denied consideration except to a small extent. Therefore the observations of the learned Chief Justice apply to the present case to their full extent. I think that the present case is even stronger than the case before the Bombay High Court. As I pointed out, the transactions began with a suspicious transfer of a mortgage document. Appavu was involved in litigation with his brother. On those additional reasons and having regard to the principles laid down by the learned Chief Justice, I have no hesitation in holding that the burden of proof is heavily on the plaintiff in this case to show that consideration passed for the plaint notes.

[His lordship then discussed the facts and came to the conclusion that the plaintiff failed to discharge the burden resting upon him to prove that any consideration other than those admitted in the written statement passed for three notes—Ed.]

In modification of the decree of the Subordinate Judge plaintiff will have a decree for Rs. 370, Rs. 375, and Rs. 250 with interest at 18 per cent. per annum till date of suit and 6 per cent. per annum from that date. Plaintiff will pay the costs of the defendant throughout.

PRIVY COUNCIL.

Present:—Lord Atkinson, Sir John Edge, Sir George Farwell and Mr. Ameer Ali.

[Consolidated Appeals from the High Court of Judicature at Bombay].

The Secretary of State for India in Council. *Appellant.** *(Respondent.)*

v.

Bai Rajbai ... ... *Respondent.* *(Appellant.)*

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The Secretary of State for India *v.* Bai Rajbai.

Act of State—Cession of territory—Legally enforceable rights against Government—Only rights conferred by agreement, express or implied or legislation by new Sovereign—Proof of—Ante-cession rights—Relevant only to prove agreement—Lease for a term—Right of renewal—Burden of proof on lessee—Renewals as act of grace—No legal right thereby—Bombay Act VI of 1862 *and Act VI of* 1888*—Application to Kasbatis.*

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*3rd June 1915.

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Annexation of territory is an act of State and any obligation assumed under a treaty either to the ceding Sovereign or to individuals is not one which Municipal Courts are authorised to enforce.

After cession of territory, the only legal enforceable rights against the new Sovereign are those which that new Sovereign by agreement express or implied or by legislation chooses to confer.

The implied agreement might be proved by circumstantial evidence, such as the mode of dealing with the parties which the new Sovereign has adopted, his recognition of their old rights and express or implied election to respect them and be bound by them.

It is only for the purpose of determining whether and to what extent the new Sovereign has recognised the antecession rights of the parties, the consideration of the existence, nature and extent of those rights is relevant.

Prima facie a lease for a term does not import any right to a renewal of it. On the contrary, it *prima facie* implies that the lessee's right to the premises demised ends with the term.

Where from the time of the cession the plaintiff and his ancestors were holding under *pattas* purporting to be only for terms of seven years, which contained no clause for renewal while the very first of them contained a clause requiring them to hand over the estate on the expiration of the term and the Government never recognised such a right. *Held*, that the plaintiff had failed to discharge the onus which lay on him of proving an agreement express or implied with the Government imposing on them a legal obligation to renew for all time if required and conferring on the lessee the correlative legal right to demand that renewal.

The fact that the Government did not intend to disturb the lessees and even intended, if all things went well, to grant to them as acts of grace new leases as the old leases expired and that the lessees believed and trusted that this would be done and the fact that for a long time the leases were renewed might give rise to moral obligations but the mere repetition of such acts of grace could not *per se* give legal right to their continuance.

Held, also that Bombay Act VI of 1862 had no application to Kasbatis and that Act VI of 1888 which applied not the effect of enlarging the leasehold interest reserved to them under contracts with them into a permanent heritable and transferable property.

These were consolidated appeals from a judgment of the Bombay High Court, (Chandavarkar and Heaton, JJ). The plaintiffs sued the Secretary of State for a declaration that they were the absolute owners of the village of Charodi, and for an injunction restraining the latter from causing obstruction to the possession and enjoyment of the plaintiffs except so far as the levying of the amount of the *jama* is concerned.

The suit village was situate in the parganah of Viramgam, in the district of Ahmedabad, in the province of Guzerat. This village along with 16 others in the parganah of Viramgam came under the British administration by virtue of the cession of the district of Ahmedabad to the British by the Gaekwar in the year 1817. At the date of the aforesaid cession these seventeen

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villages, including the suit village of Charodi were in the possession and management of Mahomedans of a class called Kasbatis.

The settlement of the territories ceded was not practically undertaken till the year 1822-1823. An officer of the East India Co., was put in charge, duly authorised to investigate local conditions and make suggestions and recommendations for the carrying through of this work. The proceedings of this officer, Mr. Williamson, so far as they affect the case, are discussed in their Lordships' judgment. The Kasbatis claimed the status of proprietors of their villages whereas the British Government was inclined to the view that they were not proprietors but merely managers of the villages holding them on a precarious tenure. Pending decision of the claims of the Kasbatis the British Government took these 17 villages under their own management.

The matter ended in a settlement dated May 1823, under which 9 out of these 17 villages were restored to the management of the Kasbatis at an annual rent fixed, for the period of 7 years. The remaining 8 villages were permanently taken under the direct management of the Government. This settlement was evidenced by a series of *pattas*, one for each of the nine villages given by the British authorities to the Kasbatis. At the end of this seven years' settlement the Kasbatis claimed the return of the other eight villages. Consideration of this demand and possibly other matters also delayed the renewal of the settlement; but on the 31st August 1883 settlement *pattas* were again given to the Kasbatis for the management of the nine villages from 1831 to 1837. The rent remained as before but the conditions of management were stated in greater detail. Restoration of the eight villages was finally refused. In 1838 another 7 years' settlement was made at the same rental but no copy of the *patta* was produced at the trial. In 1845, at the close of the third period of 7 years the Government proposed to raise the rent and the Kasbatis protested. The 9 villages were again attached by the Government and negotiations proceeded. The result was a more definite settlement for each of the nine villages. That for Charodi is contained in a *patta* dated 4-9-1849 which was signed by the Kasbatis in token of their acceptance of the conditions therein laid down. The *patta* of 1849 with all its important clauses, is described at length in their Lordships' judgment. Thereafter further settlements were made, the latest of which was provided for an increased jama and was for one year only, 1863—1864,

After that the Kasbatis, continued to manage the villages and pay the rent without any further *patta* being given to them. On 22-12-1879 the Chief Kasbati of Charodi executed a lease for 7 years to the British Government, which provided, that at the end of the term, the lessee "should yield up the village without obstruction or objection, unless the Secretary of State in Council should be pleased to renew the lease for a further term." In 1896 the matter of the tenure of the Kasbatis was comprehensively dealt with by the Government of Bombay in a Resolution, in which they laid down that the suit village was held on leasehold tenure at the pleasure of Government. The Government accordingly directed that the village of Charodi, along with certain others, should be resumed and notice to quit was served on the Kasbatis of on 27-1-1898. Hence the Kasbatis of Charodi, the plaintiff, brought the present suit.

The District Judge of Ahmedabad found that the Kasbatis were proprietors of the village subject to the liability to pay *jama*, to the Government and decreed the suit. The High Court (Chandavarkar and Heaton, JJ.) affirmed that decree, but remanded the case, holding that though the Kasbatis held the village on a permanent tenure, it was subject to certain conditions. The District Judge returned a finding that all the conditions and restrictions which the Government thought worth retaining, had already been imposed by express legislation (*viz.*, the Bombay Land Revenue Code, 1879, and the Gujarat Talukdars Act, 1888) and it was, therefore, not necessary to set them out in the decree. The High Court however, while declaring the plaintiffs' right as proprietor of the village, incorporated in its decree various conditions subject to which the plaintiffs' tenure was to be held.

In the course of their judgment, they observed, as follows :—

The result is to leave on my mind the conviction that we are not concerned with the question whether in 1820 the Kasbatis were talukdars or proprietors or mere revenue managers of the village of Charodi. Whatever the character of their holding prior to and at the beginning of British rule, settlements were made and settlements were accepted. This is perfectly clear from the following circumstances :—

"In their own petition of 1831, Exhibit 207, they specifically speak of accepting the terms proposed by Mr. Williamson, an officer of Government, who negotiated with them. Their petition of June 1845, Exhibit 208, implies clearly that they then

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accepted and had for years accepted the position as they understood it, which was that they held only the nine villages permanently, at a fixed rent. By signing the *patta* of 1849, Exhibit 259, they accepted a modification of their position as previously maintained and agreed to hold the nine villages at a rent subject to revision by Government. Their conduct in continuing to hold the village of Charodi on those terms ever since confirmed the conclusion that their tenure must be determined by ascertaining the nature of the settlement as between them and the Government. And admittedly this is so. But there is the greatest difference of opinion as to what that settlement really was. The plaintiffs say that under the settlement they were to hold permanently though as later events have demonstrated at a rent subject to revision. The defendant says that under the settlement the Kasbatis were to hold unconditionally at the will of Government. The only possible value or relevancy, in my opinion, of evidence as to the tenure on which the Kasbatis held prior to the earliest settlement, is to indicate the probability one way or the other that the Government of the time would refuse to recognise the permanence of the holding by the Kasbatis or that the Kasbatis could be induced to continue in management on any understanding but that their tenure was permanent. It seems to me that it is quite enough to understand certain easily ascertained facts of the time and unnecessary to embark on a voyage of discovery as to what was the truth as to those facts which are difficult of ascertainment. The former facts are these: The Kasbatis claimed full proprietory rights and they undoubtedly were in management of the villages. This management included a good deal more than the mere collection of revenue and taxes. The Government were anxious to impose a settlement which would secure a fair and certain revenue, encourage cultivation and the reclamation of waste lands; they were anxious to maintain order and the security of life and property and thought that management by the Kasbatis would be bad both for the development and the security of the country. Accepting those facts, a consideration of the evidence as to what followed is in my opinion a sufficient and the correct basis for a conclusion.

The issue briefly put is whether the series of transactions between the Government and the Kasbatis discloses a setlement implying a holding by the Kasbatis absolutely at the pleasure of

Government or a holding by them of a permanent character provided that the imposed conditions were complied with. It was not alleged by the defendant in the lower Court that the conditions imposed had been violated. The defendant's case was that the Kasbatis held and hold unreservedly at the pleasure of Government. To determine this issue it is necessary to examine the documentary evidence comprised in the correspondence between Government and their Officers relating to the settlements; the several settlement *pattas*; and the petitions of the Kasbatis. The earliest of these papers, Exhibit 247, is a letter from Mr. Williamson, the Assistant Collector of Ahmedabad, to the Secretary to Government, dated 3rd August 1822. In this letter Mr. Williamson tells what he knows of the position of the Kasbatis and their past history and describes briefly what happened after the British took over the villages. He then suggests an arrangement by which the Kasbatis should surrender some of their villages, permanent possession of the others being secured to them.

* * * * *

"To sum up my reasoning; the tenure of the Kasbatis must be determined by the circumstances attending the restoration to their possession of nine villages, and the subsequent negotiations and agreements between them and the Government. The initial circumstances suggest very clearly that the restoration was not of a temporary, but of a permanent character. But there are words in the earliest of the *pattas*, which literally interpreted would mean that the restoration was of a purely temporary character. Nevertheless these words are easily capable of a different interpretation and the different interpretation is indicated by the circumstances in which they were used."

"The subsequent events show with perfect clearness, that the Kasbatis understood that the restoration was permanent, and that the Government if they had any real doubt as to that matter which is uncertain—never expressed their doubt to the Kasbatis. The latter have continued to hold for now more than 80 years and from the very earliest period of their holding nothing has been said to them or done by Government in relation to them, indicate to them, that they had anything but a permanent holding in the nine villages, that is until the notice to quit was given which has led to this suit. On the other hand much has been said and done to assure the Kasbatis that they held permanently."

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"I use the word "permanent" throughout as contrasted with the word "temporary" and not in the sense of "prepetual" for it is perfectly clear that though the Kasbatis held permanently, in the sense which I mean, they did not hold unconditionally and the Government undoubtedly have taken power to themselves and the Kasbatis, at any rate in 1849, accepted the existence of this power to resume the villages, if the conditions imposed were not fulfilled. One of these conditions has consistently been that the Kasbatis should not alienate their interest in the management of the villages. Besides this and other expressed conditions, there may have been others, which were only implied. And it is this possibility which led the Advocate-General, in appeal, to advance a contention, which had never been advanced in the Court below. He said, even if we assume that the holding was permanent, yet the evidence shows beyond doubt that it was to be permanent only with the Kasbatis; that they were left in management of the villages for their maintenance and the support of their dignity; and that it cannot possibly have been the intention of Government, or part of the terms on which the villages were restored to their management, that they should ever pass away from the Kasbatis. And he says, the moment that the management is continued to female heirs—and the plaintiffs are female heirs—there arises the possibility of the villages passing into the hands of those who are not Kasbatis. The solution of the difficulty here suggested depends upon determining whether there was an implied condition that the villages should not descend to females, or, if females were allowed to hold, to their heirs or descendants who might not be Kasbatis. The existence or non-existence of such an implied condition can only be determined by a scrutiny of evidence adduced for the purpose of proving or disproving such a condition. And the evidence adduced in the lower Court was not directed to that object. In that Court the attitude taken and throughout maintained by the defendant was, not that they had a right to put an end to the possession of the plaintiffs, because of the breach of some condition on which the Kasbatis held the village, but that they had an absolute, unconditional right to put an end to their possession."

"On the case so presented, the defendant has failed and it seems to me that we ought not now to determine this suit on a

contention never raised in the Court below, and one to which the adducing of evidence has never been directed. And therefore I do not propose to say anything, one way or the other, as to whether the evidence, which is on the record does or does not go to establish such a condition."

Sir Erle Richards, K.C., and *G. Lowndes* for the appellants contended that the tenure of the village of Charodi since 1823 had been of a leasehold nature and the plaintiff had no right of ownership. The question to be considered is what was the nature of the right granted by the British Government. The nature of the right enjoyed by the Kasbatis before the British occupation under the Indian rulers is irrelevant. The Government was not bound to recognise such rights. *Cook* v. *Sprigg* [1], referred to. The predecessors-in-title of the plaintiff having accepted the pattas on certain terms from the Government and having continued in possession thereon the plaintiff were estopped from denying the title of the defendant. The Government at the time of the settlement made an agreement with the *Kasbatis* that they were to retain possession of nine of the villages found under their management during the pleasure of Government. The correspondence in 1823 clearly established that. The Government after the expiry of the lease was free to deal with the villages as it pleased. The Government should not be held bound to recognise as the holder of the village any person who is not a lineal male descendant of the original grantee. The patta of 1823 was only for 7 years at a rental of Rs. 100. In 1833 a new patta was granted for a further period of 7 years, neither the original nor a copy was forthcoming. In 1874 on the failure of the issue of the Kasbatis 2 villages were resumed and Government refused to recognise the nearest collaterals. They then instituted a suit in the district of Ahmedabad and produced a Sannad of the Moghul Emperor as the root of their title. The Sannad was treated as a forgery and the claim dismissed. No appeal was preferred. All the leases were for a fixed period and there was no mention of any provision that upon the expiration a new lease was to be granted to the lessees. That shows that they have legal rights to obtain a renewal of the lease. The burden lay upon the plaintiff to show that he had a legal right to obtain a renewal of the lease for a fixed term or for all time. Kasbatis were merely

1. (1899) A. C. 572. Ref. into (1906) 1 K. B. 634.

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collectors of revenue. The word talukdars had no technical meaning as in Oudh. Act VI or of 1862 and Act VI of 1888 conferred no rights on Kasbatis. The Crown Liabilities Act of 1888 did not permit an action against the Sovereign in virtue of obligations assumed under a treaty and the Municipal courts could not enforce the same. Reference was made to *Collector of Trichinopoly* v. *Lekkamani* [1] *Waghela Rajsangi* v. *Sheik Mashadhin* [2] *Collector of Ahmedabad* v. *Samal Das* [3] *Secretary of State* v. *Kamashiboye Sahabi* [4].

De Gruyther, K.C., with him *Parikh* for the respondent contended that the history of the settlement of 1823 clearly established that the villages left to plaintiffs' ancestors was intended to be kept by them permanently though it was open to Government to raise the jama. The pattah of 1823 so far as it contained any words capable of a different meaning was a nullity. What happened in 1823 was in the nature of a settlement by Government in recognition of the vested rights of holders enjoyed by them prior to the British occupation. When the British Government took over the management of Ahmedabad they did not confiscate rights. Settlements had been made with Kasbatis prior to 1823 by Government. The British continued the system of the Mahrattas. In 1821 Mr. Elphinstone wanted to have settlements for a fixed term of years and this was done. The form of pattah was the same all over the district for the talukdhars. The settlement of Mr. Williamson was general for the whole district. The words 'during the pleasure of Government' cannot be held to mean that they were tenants at will. There is no provision in the patuas for the termination of their rights at the end of the term The plaintiffs have been addressed by Government as talukdhars. Even the president in council referred to the Kasbatis as Talukdhars. The lands descended from father to son and Jama was a percentage of the assessment. The owner mortgaged the lands and decrees have been obtained as if they were owners. The right to eject the plaintiffs who have been in possession since 1823 was on the plaintiff which he had not discharged. Bombay Act VI of 1862 was applicable and Bombay Act VI of 1888 expressly so. The respondent was entitled to hold the lands free from any condition

1. ( ) L. R. 19 A. 288, 305.
2. ( ) L. R. 14 of A. 89, 91.
3. ( ) 11 B. H. C. R. 211.
4. ( ) 13 M. P. C. 22.

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other than those imposed by the said statute. Elphinstone's minutes clearly showed that the term 7 years was fixed in the interest of Kasbatis to protect them from the hands of the oppressing Collectors and not to limit the tenure. They were entitled to hold permanently at a rent subject to revision. The object of Act VI of 1862 was to recognise the talukdhars as owners of the land and Kasbatis were talukdhars.

Sir Erle Richards replied:

The judgment of their Lordships was delivered by

Lord Atkinson.—These are consolidated appeals from preliminary and final decrees of the High Court of Judicature of Bombay, dated respectively the 16th of April 1909, and 11th of April 1911, modifying a decree of the District Judge of Ahmedabad, dated the 30th of November 1907, in suit No. 7 of 1898 in his court.

The question in issue in the action for an injunction, out of which these appeals have arisen, is whether the plaintiff, like her male ancestors, is not entitled to the continued possession, management, and enjoyment of a certain village called Charodi, about 2,200 acres in extent, situated in the pargana Viramgam, in the district of Ahmedabad in the province of Gujerat. In her plaint she bases her right on her absolute ownership of this village. In argument before this Board and in the judgments of the courts below her right has been also based apparently upon the following title, namely this, that though her ancestors took from time to time several leases of this village from the Bombay Government, each for a term of years, they were not, as the appellant contends, mere lessees bound to give up to their lessors at the end of each term the possession of the demised village; but were legally entitled, as each lease terminated, to have a new lease granted to the last lessee or his representative. Either title, if possessed by her, would enable her to succeed in this action. In order to arrive at a conclusion on the issue thus in dispute between the parties, it is necessary to examine briefly the history of this district of Ahmedabad before its cession by the Gaekwar, with the concurrence of the Peishwa, to the British Government in the year 1817, and to examine more in detail the dealings of the Bombay Government after that date with a certain class of its inhabitants, Mahomedans in religion, said to have originally come from Delhi under the Great Mogul, and styled indifferently

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Casbatees and Kasbatis, and especially their dealings with the ancestors of the respondent, who belonged to that class, touching this village of Charodi.

The ancestor of the respondent in possession of this village at the time of this cession was one Jehangirbhai *alias* Bapuji. One Fatumyia, his grandson, died in the year 1891 childless, leaving him surviving his widow, Nandbai, one of the plaintiffs in the action, who has died during the course of the litigation. One Bapuji, the brother of Fatumyia, died some years ago, leaving his son, Bapabhai, his only issue him surviving, and Bapabhai himself died in the year 1893, leaving his daughter, Bai Rajbai, the other plaintiff, his only child him surviving. This lady, who subsequently married and was left a widow, has thus become the sole surviving descendant of the member of the Kasbaties class who was in possession of this village of Charodi at the date of the aforesaid cession. The term Kasbatis, it is not disputed, was used to designate dwellers in towns whose lands were cultivated not directly by themselves but by ryots, to whom they let them, receiving therefor a rent in cash or in kind. They were, in addition, apparently invested with certain powers of Government over their villages, including the management of village affairs. At the time of the cession the Kasbatis were possessed of 17 villages within the pargana of which Charodi was one. The settlement of the territories ceded was not practically undertaken till the year 1822-1823.

In the interval an accredited public official of the company was put in charge, duly authorised to investigate the local condition, and make suggestions and recommendations for the carrying through of this work In the conduct of this business and in discharge of these duties he made reports to his superiors in which he sketched the history of the Kasbatis, the Grassias and other classes or families amongst the inhabitants, and purported to describe the rights they had theretofore respectively acquired as against the ceding Sovereign, the Gaekwar, to the land of which they were in possession, and the villages over which they exercised some primitive powers of management and control. Some of these reports have been received in evidence apparently without objection On two of them, sent by Mr. Williamson, described as the Assistant Collector in charge, the first bearing date the 3rd of August 1822, to the Secretary of the Government of Bombay,

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and the second bearing date the 28th of May 1823, referring to the first, to the Collector of Ahmedabad, much reliance has, naturally, been placed. In the first he reports, amongst other things, that there were 17 villages in the Viramgam pargana, held for a considerable number of years by several families of Casbatees or Kasbatis under a peculiar kind of tenure; that their possession had been frequently interrupted, and had not therefore been sufficiently continuous to found prescriptive rights; that as soldiers of some property, family, and character, they had acquired a partial influence in the affairs of the pargana, and often had obtained from the local managers leases of villages on favourable terms, in the granting of which nothing further had been intended than that the villages should remain in their temporary charge; that after the grant of the farm of Ahmedabad by the Peishwa to the Gaekwar, the Kasbatis had enjoyed the produce of some of these villages for 25 or 30 years on a revenue which was increased or lowered according to the pleasure of the local managers; that in 1804 they were dispossessed of these later by one Babaji Appaji, a manager of the Peishwa, who demanded a higher jumma than the Kasbatis would consent to pay, but were restored to possession ten years later; that thus by a train of circumstances of such an undefined nature that it was difficult to describe them, the class had acquired a sort of claim to the villages of which they were found in possession when the country was delivered to the Bombay Government; that since the authority of that Government had been established at Ahmedabad revenue settlements had been made with them, except where they refused to pay an adequate jumma,

"but being men of ignorance or bad circumstances and of very indolent habits,"

they were altogether incompetent to conduct village concerns; that their villages were of vast extent and capable of much improvement; that they were well aware of the precarious tenure by which they held their villages (as they were merely what might be called lease-holders), and that he had every reason to believe they would be well satisfied with an arrangement which would secure to them permanent possession of a portion of their villages.

Mr. Williamson then proposed for the consideration of the Government a plan to this effect: to give to each Casbatee one, or

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according to the circumstances and claim of the particular person, two, of the smaller villages on a jumma less than that which they had hitherto paid, thereby keeping up their name and respectability as landowners, and enabling them to devote their whole attention to cultivating and improving their properties, while the small amount of revenue levied on the villages remaining in their hands would compensate them for the loss of those surrendered to the Government.

This plan was not approved of by the Government. On the contrary, the Government Secretary wrote to the assistant in charge of the Collectorate of Ahmedabad (presumably this same Mr. Williamson, as he so described himself) a letter bearing date the 22nd of November 1822, acknowledging the receipt of the latter's letter of the 3rd of August previous, and informing him that though the plan he suggested might be agreeable to the Casbatees, the Governor-in-Council doubted whether it would afford any permanent relief; that it was considered that a more desirable arrangement would be to give to the Casbatees pensions, to be fixed by the Government, for a life or a number of lives, but that if these latter should be unwilling to accept pensions Mr. Williamson's plan should be adopted. The Casbatees refused to accept pensions, but Mr Williamson's plan, though adopted in part, was not adopted in its entirety. One of its provisions of vital bearing on the present controversy was not adhered to. He had suggested that the Kasbatis should be secured in permanent possession of such of their seventeen villages as should be left to them. Whereas on the 28th of May. 1823, he wrote to the Collector of Ahmedabad informing him that he (Williamson)

"had concluded an arrangement with the Casbatees of Viramgam by which they "are to retain during the pleasure of the Government, nine of the villages found "under their management when the Pergunna fell into our possession."

He proceeded to point out that by this arrangement the interference of the Casbatees would be removed from eight of their villages, the produce of which was valued at 13,800 rupees, while that of those remaining with them was only valued at 5,300 rupees, but that the jumma in respect of these latter was so small, namely, 1,925 rupees, that there would remain for their maintenance 3,375 rupees, a sum differing but little from that of 3,820 rupees which, according to his calculation, was all that would have been available for their maintenance had they continued in

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possession of their seventeen villages. Then follows this passage :—

" The lease being granted for seven years affords the Casbatees an opportunity " of availing themselves of these capabilities (*i.e.*, the capabilities of their villages " of improvement). The condition of the villages and the rules respecting leases " laid down by Government guided me in fixing the term."

On the 23rd of June 1823, the Secretary of the Government of Bombay wrote to the Collector of Ahmedabad informing him that the Governor in Council approved of Mr. Williamson having made an—

" agreement with the Casbatees by which they are to retain during the pleasure of " Government nine of the villages found under their management when the " pergunna fell into our possession."

The expression " at the pleasure of Government" is not very " happily chosen. Since leases for terms of seven years were to be given to the Kasbatis, it obviously could not have meant that they were to hold these nine villages merely as tenants at will of the Government. What it must, in their Lordships' view, have meant in this connection was that they should receive at once leases for a term of seven years, and that after the termination of these leases, the Government would be free to deal with them as it pleased, to renew their leases or to permit them to continue in possession without leases, or to dispossess them altogether, as the Government might in its discretion think fit. If that be so, then there could not have been on the part of the Government a more emphatic assertion of their resolve that the lessees should not have any legal right, as against it, to a renewal of their leases or the permanent possession of their villages.

Before dealing with the action which the Government of Bombay took in reference to this village of Charodi on receipt of these reports, it is essential to consider what was the precise relation in which the Kasbatis stood to the Bombay Government the moment the cession of their territory took effect, and what were the legal rights enforceable in the tribunals of their new Sovereign, of which they were thereafter possessed. The relation in which they stood to their native Sovereigns before this cession, and the legal rights they enjoyed under them, are, save in one respect, entirely irrelevant matters. They could not carry in under the new *regime* the legal rights, if any, which they might have enjoyed under the old. The only legal enforceable rights they could have as against their new Sovereign were those, and

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only those, which that new Sovereign, by agreement expressed or implied, or by legislation, chose to confer upon them. Of course, this implied agreement might be proved by circumstantial evidence, such as the mode of dealing with them which the new Sovereign adopted; his recognition of their old rights, and express or implied election to respect them and be bound by them, and it is only for the purpose of determining whether and to what extent the Sovereign has recognised these anti-cession rights of the Kasbatis, and has elected or agreed to be bound by them, that the consideration of the existence, nature, or extent of these rights become relevant subjects for inquiry in this case. This principle is well established, though it scarcely seems to have been kept steadily in view in the lower courts in the present case. It is only necessary to refer to two authorities on the point, namely, the case of *The Secretary of State for India* v. *Kamachee Boye Sahaba* decided in the year 1859, and *Cook* v. *Sprigg* [1], decided in the year 1899.

In the first this Board had to deal with the action of the East India Company in seizing in exercise of their Sovereign power, in trust for the British Government, the Raj of Tanjore, and the whole property of the deceased Rajah, as an escheat, on the ground that, by reason of the failure of the male heirs of the latter the dignity of the Raj was extinct, and that the property of the Rajah had thereby lapsed to the British Government. Lord Kingsdown, delivering the judgment of the Board, is, at page 540, reported to have expressed himself thus:—

"The result, in their Lordships' opinion, is that the property now claimed by "the respondent has been seized by the British Government, acting as a Sovereign "power, through its delegate the East India Company, and that the act so done, "with its consequences, is an act of State over which the Supreme Court of Madras "has no jurisdiction. Of the propriety or justice of that act neither the court "below nor the Judicial Committee have the means of forming, or the right of "expressing, if they had formed, any opinion. It may have been just or unjust, "politic or impolitic, beneficial or injurious, taken as a whole, to those whose inte-"rests are affected. These are considerations into which their Lordships cannot "enter. It is sufficient to say that if a wrong has been done, it is a wrong for "which no municipal court of justice can afford a remedy."

Now, in that case, the act complained of was of a tortious character.

In the second case the Judicial Committee had to deal with a concession given by the ceding Sovereign, the paramount chief

1. (1899) A. C. 572.

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of Pongoland. The appellants sought to enforce in a court of law their rights under this concession against the English Government to which the territory over which the concession had been given was ceded by this chief. The decision in the first-mentioned case was followed, the above quoted passage from the judgment of Lord Kingsdown approved of, and it was held that the annexation of territory was an act of State, and that any obligation assumed under a treaty either to the ceding Sovereign or to individuals is not one which municipal courts are authorised to enforce. As far, therefore, as the legal rights of the Kasbatis, enforceable against the Indian Government in Indian courts are concerned, the abovementioned cession of territory must be taken as a new point of departure. Mr. Williamson's conclusions as to the positions, rights, and interests of the Kasbatis may have been quite erroneous. The Kasbatis may have been absolute owners of their villages, as the respondent contends, and yet the consideration of their antecession rights is beside the point, save so far as it can be shown that the Bombay Government consented to their continuing to enjoy those rights under its own *regime*.

In their Lordships' view, putting aside legislation for the moment, the burden of proving that the Bombay Government did so consent to any, and if so, to what extent, rests, in this case, upon the respondent. The Kasbatis were not in a position in 1822 to reject Williamson's proposal, however they might have disliked it, or to stand upon their ancient rights. Those rights had for all the purposes of litigation ceased to exist, and the only choice, in point of law, left to them was to accept his terms or be dispossessed. There is nothing, therefore, to support the contention that they never would have accepted Williamson's terms had the permanent possession of their villages not been promised to them. It may well be that the Bombay Government did not intend to disturb them, and even intended, if all things went well, to grant to them, as acts of grace, new leases as the old leases expired, and it may also well be that the Kasbatis fully believed and trusted that this would be done, as indeed for many years it was done. From these facts, if they existed, moral obligations (with which this Board is not concerned) may arise, but the mere repetition of such acts of grace cannot *per se* create legal right to their continuance.

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Though notice was served on the two plaintiffs to produce all documents in their possession touching the issues raised in the suit, no patta or kabuliyat executed in 1823, was produced or given in evidence, but two Government records of that year were produced as secondary evidence of the contents of a patta then granted to the Kasbatis then in possession of the nine villages retained by them, including this village of Charodi. According to these records a patta of the village was then given to Bapabhai, the father of Fatumyia, for a term of seven years, at a jamabandi of 100 rupees, with a covenant by the lessee that he should not sell or mortgage the village, or give, or allow anyone to give, any land of the village in Pasayta, or keep any debt upon the village, but should make it prosperous, and should hand it over to the Government in the year 1831. If these be the true contents of the patta they absolutely negative the existence of any legal right enforceable in an Indian tribunal, either to have the leases of the village from time to time renewed, or to continue in possession of it after the leases had expired.

As to this village of Charodi, one must start then on the inquiry as to what rights were granted by the Bombay Government to the respondent's ancestors, with this admitted fact, that in the sixty-eight years which have elapsed between the year 1822 and the institution of this present suit, not even in one of the several pattas granted to them is any provision to be found to the effect, that upon its expiration a new patta is to be granted to the lessees or their representatives or successors, while the very first of these pattas contained a clause expressly negativing the existence of such a right The reasonable and proper inference to be drawn from the silence of the pattas on this important point is, Sir Erle Richards, on behalf of the appellants contends, that the legal right to obtain renewals of the pattas was never conferred upon the repondent's ancestors. And, no doubt, if the draftsmen of these instruments had even a rudimentary knowledge of their business, one would have expected that such an important matter as that would have been provided for, but, unfortunately for this contention, those experts have drawn these instruments in language so obscure that the instruments could scarcely have been more obscure had obscurity been aimed at, and have resolutely omitted from every patta but the first the ordinary provision to be found in every properly-drawn lease, that the lessee shall

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deliver up possession at the end of the term. Mr. De Gruyther, on behalf of the respondent, on his side not unnaturally contends that the inference to be drawn from the continued omission of such a provision is that the lessees had a legal right to continue in possession after the patta, or lease, had terminated. He puts forward, moreover, as their Lordships understood him, this additional contention, namely, that in 1822 a settlement was made with the ancestor of the respondent then in possession of this village of Charodi, in which the amount of the jumma was fixed, that the effect of such a settlement is that the person in possession by whom the jumma is to be paid, was fixed or settled permanently in the possession, at all events, of the village, with a right to manage it, that the pattas could not have been designed to take away the rights thus conferred, and that the only way of reconciling the grant of them with the relation created by the settlement is to hold that the patta only dealt with the jumma and the mode of management of the village, not with the tenure of it, if that term may be used. To determine which, if any, of these contentions is well founded, it is necessary to examine in detail the provisions of those pattas the contents of which are satisfactorily proved.

First, then, as to the pattas granted on the 31st of August 1833 : In the year 1827, during the currency of the first lease, a report was made to the Talukdari Settlement Officer by Lieutenant Melville, of the 7th Regiment, in which he described the Kasbatis of Viramgam as proprietors of certain villages. He apparently was not aware that they then actually held under pattas for terms of years granted to them by the Bombay Government. No importance can therefore be attached to his use of the word "proprietors." In July 1831, the question of the increase of the jumma fixed by the first batch of leases was under consideration. Several Kasbatis presented a petition to the Government insisting that the jumma fixed in 1822 was then fixed permanently, and should not be increased, also asserting that it was part of the arrangement made by Williamson that the eight villages taken from them in the first instance should, at the end of the seven years, be restored to them, and claiming that this arrangement should be carried into effect. The reply of the Government to this petition, dated 16th September 1831, was to the effect that the order made by the Governmen on the 16th of November 1822 could not be set aside. Sometime thereafter the abovementioned

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lease was granted to Bapabhai, the father of Fatumyia, and his brother, Miabhai, as the lessees. It is endorsed as having been delivered to the latter. The jumma is increased to 142 rupees, payable in eight instalments, at different times, and in unequal amounts. The term is seven years, commencing in the year 1830-31 and terminating in the year 1836-37.

By the second clause of the lease it is provided that on failure to pay any instalment on the day named, the Government are to "take back" the patta, and cause the revenue of the village to be collected by other hands, the lessees being responsible for any deficit in the year in which the putta is taken over, and that at the end of that particular year the Government

"would, if it so pleases, give the village to some person other than the lessees, who "it was asserted shall not get it,"

but should be held liable for any loss which might accrue to the Government during the remainder of the term.

The seventeenth clause provides that if the Government should find that the lessees were spoiling the village, or did not abide by the clauses of the lease, the Government would send arbitrators to inquire into the matter, and if they should find that the village would be spoiled if allowed to remain in the hands of the lessees the putta would be taken back from them, and they would have to pay such a penalty as the Government might choose to impose.

The facts that the granting of a patta for seven years was part of the arrangement made with Mr. Williamson, and that the patta then granted contained a clause that the village should be given up to the Government at the end of the term, coupled with the clauses of the lease of 1833, providing for the transfer of the village in certain events to persons other than lessees are quite destructive of the theory, that these pattas merely regulated the amount of jumma but not the tenure, and that independently of them altogether, this family of Kasbatis was fixed in permanent possession of this village of Charodi. In the year 1838 a new patta was apparently granted for seven years, but neither the original nor any copy of it was forthcoming at the trial. On the expiration of this term in the year 1845, the Collector forwarded to the Revenue Commission of Ahmedabad a report, dated the 8th of September 1845, proposing, amongst other things, to increase the jumma of this village. In it, he sets forth in paragraph 5 that the Kasbatis being sent for in order to enter into a

fresh settlement declared that the settlement made by Mr. Williamson was permanent and that the jumma was not to be increased. They were unwilling to take leases, on any terms other than the original. The Collector thereupon refused to renew the leases and limited the privileges of the Kasbatis to the receipt of 20 per cent. on the revenue pending the pleasure of Government. In the 10th paragraph of the report, he proceeds to add :

"This long enjoyment of the villages at the same rental has increased their "(i. e., the Kasbatis) real or feigned impression that the original settlement was "permanent, which it certainly was not."

He then proposed that the rent of the villages should be slightly increased, and that if the Kasbatis did not accept the leases offered, the villages should continue under the direct management of the Government, and the Kasbatis should be allowed 20 per cent. of the revenue.

It will be observed that both parties to this dispute took their stand respectively on Mr. Williamson's arrangement. They only differed as to its terms. The Kasbatis insisted that according to it the eight villages taken from them were to be restored to them at the end of the term of the first lease, and that the rent should not be increased, while the Government insisted that the grant of any lease after the first was entirely a matter at their discretion.

The Government refused to yield. The position they took up clearly appears from a letter dated 24th February 1847, addressed by the direction of the Governor-in-Council to the Revenue Commissioner of this district, Mr. A. Blane, pointing out that the Casbatees did not appear from the former proceedings connected with the settlements previously made with them to have any valid title to

"a permanent continuance of the terms upon which they have hitherto held "their villages,"

and suggesting that the jumma should be increased by 5 per cent., that if they consented to this their term might be renewed for seven years, but that the Governor-in-Council desired that a distinct reservation should be inserted in the new lease endorsing the right of the Government to raise the rent if circumstances should show it to be expedient, and that if they refused to consent to this the villages should be retained under Government management, and allowance being made to the Kasbatis during pleasure to an amount equal to the profit which Mr. Williamson settled would have been left

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them. There could scarcely be an assertion more absolute than this of the power of the Government to alter the terms of any leases they might make to the Kasbatis as they themselves should deem fit, to give or withhold such leases at will, and to dispossess the Kasbatis and take the management of these villages into Government hands.

The existence, however, in the Bombay Government of the power and right which they assert in this letter of the 24th of February 1847, belonged to them, is equally inconsistent with the existence in the respondent or her ancestors either of the absolute ownership of this village or of the right to have the leases of it perpetually renewed. The Government terms were ultimately accepted, and a new patta of the village, bearing date the 4th of September 1848, was granted to Fatumyia and Bapuji, his brother (the respondent's grandfather), to hold for a term of seven years from (1844-45) to (1850-51) at the increased yearly rent of rupees 144-1-9, payable by five instalments on the days therein named. The lease is executed by the lessees. It will be found at p. 68 of the Record. Had not the draftsman of this instrument been, like his predecessor, almost enamoured of obscurity, one would have expected that he would have laid at rest all matters of dispute on this point by simply inserting in this lease the proper and usual provision that at its termination the lessees would deliver up possession of the demised premises to the lessor. Through ignorance or carelessness he resolutely abstained from doing this. He did, however, insert some clauses which merit attention. It is provided, *first*, that if the instalments of the rent be not paid when due, attachment will be levied on the village by the Government, and "the management" will be carried on, presumably, by the Government. *Secondly*, that the lessees shall not alienate or pledge the village or the land composing it to anyone. *Thirdly*, that the lease was granted out of kind consideration for the lessees' maintenance, that they, the lessees, should therefore make good arrangements for the prevention of crime in the village, or otherwise the (tharav) settlement would be cancelled. *Fourthly*, that if an attachment for arrears of rent were levied by the Collector, or if a creditor by an application to the courts caused an attachment to issue against the village, the management of the village would be taken out of the hands of the lessees and carried on by the Government, the (tharav)

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settlements would be cancelled, and the whole income of the village to be taken charge of by the Government.

Then follows a clause, No. 10, inconsistent to some extent with the succeeding clause, No. 11, but evidently introduced to put an end for the future to all controversy touching the increase of the jumma. It provides that the village is given to the lessees on patta according to the settlement or agreement thereinbefore set out, that when the lease expired the lessees should hold charge of all income and produce of the village and should agree to the payment of the amount of the revenue which the Government might fix, and that if they failed to pay this the income should be taken charge of by the Government. The eleventh clause provided that the village was given on patta to the lessees on the agreement thereinbefore set out, and that if they did not act accordingly to the agreement the patta should be void.

The existence of the statement that the putta was granted out of kind consideration for the maintenance of the lessees is due to this, that during the dispute about the increase of the rent, the two lessees and another person had presented a petition to the Revenue Commissioner stating that they were in very indigent circumstances, that attachments had gone out against their villages, and that they had not left in their houses corn for their sustenance or any wearing apparel.

If the evidence of the case stopped here it would, in face of this lease, in their Lordships' opinion, be quite impossible to contend that the patta merely fixed the amount of the rent, and that by the settlements the lessees or their ancestors had acquired as against the Bombay Government a right to the property in, or to the permanent possession of, this village of Charodi. The granting of a lease was part of the original settlement or agreement, and these leases are treated in several places as the instruments by which the estate or interest in the village is conveyed to the lessees.

This clause 10 is the only piece of written evidence produced, indicating even in the most remote way that the lessees were entitled at the end of each lease to have a renewal of it granted to them. *Prima facie* a lease for a term does not import any right to a renewal of it. On the contrary, it *prima facie* implies that the lessee's right to the premises demised ends with the term. In order that the respondent should succeed, therefore,

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on this point, she must find sufficient evidence, apart from legislation, of an agreement, express or implied, with the Bombay Government imposing on them a legal obligation to renew for all time, if required, these leases as they terminate, and conferring on each lessee the correlative legal right to demand that renewal. In their Lordships' view it would require something much more clear, plain and explicit than this confused, and almost unintelligible clause, to be treated as, in effect, a covenant by the lessor for a perpetual renewal of the lease of this village.

No new patta was granted in 1851. The lessees continued to hold possession and to pay the rent till 1860. Fresh pattas for one year each were given in the years 1860 and 1861, at an increased rent of 160 rupees, and again from 1862 to 1865; between 1860 and 1870 yearly renewals appear to have been granted, the rent being sometimes increased. In the year 1874 there was a failure of issue in the case of the holders of two of the nine villages retained by the Kasbatis under Williamson's settlement, namely, the villages of Keela and Leah, or Lea. The said Fatumyia claimed the former village as the nearest collateral heir of the last holder. The Revenue Commissioner reported upon this matter to the Government of Bombay, and the Governor-in-Council passed a resolution, dated the 27th November 1874, by which it was declared that the tenure of the Kasbatis was merely leasehold, and that their villages lapsed to the Government on failure of heirs. He accordingly directed that this village of Keela should be resumed by the Government.

This direction was on the 5th of July 1877 approved of by the Secretary of State. But Fatumyia and Bapuji, unwilling to submit to this decision, instituted in the year 1878 a suit against the Secretary of State for India in Council claiming to be entitled to this village as heirs of the last holder, and they supported their claim by a document purporting to be a sanad granted by one of the Mogul Emperors some centuries earlier. The District Judge who heard the suit decided that this sanad was a forgery, and that the last holder, through whom the plaintiffs claimed, was a mere lease-holder, and dismissed the action with costs. The plaintiffs acquiesced in that decision. They never sought to question it in any court of law. The question of the renewal of the leases of the Kasbati tenants was brought before the Government of Bombay about this time by the Revenue Commissioner, and a formal resolution was on the 25th of July 1877 passed by

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that Government to the effect that it appeared all the leases had expired, that there was no necessity to make any change, it being quite clear that the villages were held on leasehold tenure at the pleasure of the Government; that it was desirable to renew for periods of seven years the leases which had expired, a very slight nominal increase of rent being made in each case, to show that the Government maintained their rights and would continue so to do, and directed that words should be inserted in the new leases making this perfectly clear. This resolution was carried out. A form of lease in the English language was drawn up, and on the 7th of October 1878 approved of by the Bombay Government. It contained, amongst others, clauses restraining alienation and at last providing that on the termination or sooner determination of the lease, the lessee should, without objection or obstruction, yield up the village demised unless the Secretary of State in Council should then be pleased to renew the lease, and also a condition of re-entry on the breach of any of the provisions of the lease.

A lease in this form on the 22nd of December 1879 was granted to Fatumyia and Bapuji, the respondent's father. The kabulyat was signed by them, but, as they subsequently asserted that they did not sign the document of their own free will and pleasure, the appellant does not therefore desire to treat them as bound by it. It can only be looked at as containing a renewed expression of the view consistently entertained by the Government in reference to the true position and rights of the Kasbatis. No further leases were granted. The lessees and those who succeeded them continued to pay the rent reserved, notice was served in 1898 upon the two ladies, Bai Nandbai and Bai Rajbai requiring them to quit and deliver up possession of the village of Charodi on the 31st of July following. It was not disputed that if these ladies had by the continued payment of their rent become tenants of this village from year to year, this notice was adequate and sufficient to determine that tenancy. Up to this the evidence touching the administrative dealings of the Bombay Government and its accredited officials with the Kasbatis and their villages, including that of Charodi, has alone been dealt with.

Their Lordships are of opinion that the just and reasonable inferences to be drawn from it when properly considered are, that not only has the respondent failed to discharge the

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burden which, as already stated, rests upon her, but that the Bombay Government never departed from the position in which they were left by Mr. Williamson's arrangement; that they never by an agreement, express or implied, conferred upon the respondent or any of her ancestors the proprietary rights in, or ownership of, the village of Charodi claimed by her; that they never recognised or admitted the existence of such rights, or of any rights analogous to them, in them or her; that the only rights in his village which the Government conferred upon her ancestors were those conferred by the leases which the Government from time to time, at their own will and pleasure, chose to grant to them (save such rights as are conferred by the creation of a tenancy from year to year in manner already mentioned); that this Government never conferred upon any of the lessees of the said village a legal right to insist, at the termination of his lease, upon a new lease of the village being granted to him; in other words, that the Bombay Government never were under any legal obligation to grant any lease of this village; and that the granting or withholding of a lease of it rested from the first solely in their discretion.

It was contended, however, on behalf of the respondent that her case is much strengthened by a consideration of the Bombay Government's dealings with the Grassias. They were ancient Rajpoot proprietors, and before the cession of the Ahmedabad Zilla, stood to their native sovereigns in that relation, their lands being cultivated by ryot tenants from year to year and at will. They and the Mewassies were clearly distinguishable from the Kasbatis. The last-named held their lands by contract, neither by sanad nor by defiance, and Colonel Walker, the first official appointed to deal with this district, was well aware that there was no analogy between the holdings of the Grassias and those of the Kasbatis. The word "taluk" was first applied to these Rajpoot proprietors by the British themselves. Notwithstanding the ancient proprietary rights of the Grassias, they took leases of their lands from the Bombay Government, and thenceforward their legal rights were, in accordance with the principle laid down in the authorities already quoted, determined entirely by the contract which they had made with that Government, altogether irrespective of what their position and rights may have been before the cession of their territory.

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All this is stated at length in the account by J. Peile, Talukdari Settlement Officer of the talukdari of Ahmedabad Zilla, and the measures adopted for their restoration under and in connection with the Act 6 of 1862 of the Bombay Legislature, published in 1867, pages 7, 9, 14, 42, 43—47, 64 and 67. Indeed in the preamble of that Statute it is recited that these talukdari estates are only held on lease-hold tenure determinable at the pleasure of the Government. So that the case of the Grassias makes against the case of the respondent instead of in her favour, inasmuch as it shows clearly that after the cession of territory to a new Sovereign, when it comes to be a question of legal right the contract with the new Sovereign is conclusive and the rights against the old Sovereign avail nothing.

It only remains to consider the effect of any of the legislation of the Bombay Government on the question in issue on this appeal. Act 6 of 1862, for the reasons given in the abovementioned publication of Mr. Peile, does not apply to Kasbati lessees at all. They never were Talukdaris of Ahmedabad in the true sense. They did not lose their ancient right of ownership of their land by taking leases, as did the Grassias, and therefore did not suffer the injustice which the Statute was designed to remedy.

The Statute of 1888 is entitled an Act to provide for the revenue administration of estates held by superior landlords in the districts of Ahmedabad, &c. In the preamble it is recited that it is expedient to remove doubts as to the applicability of certain portions of the Bombay Land Revenue Code of 1879 to estates held by certain superior landlords in the abovementioned districts, and to make special provision for the administration of the said estates and for the partition thereof. In the first section a talukdar is defined to include "a Thakur, Mewassies, Kasbati and Naik." S. 23 provides that nothing in the Act shall be deemed to affect the validity of any agreement entered into before the passing of the Act by or with a talukdar and still in force as to the amount of his jumma, nor of any settlement of the amount of jumma made by or under the orders of Government for a term of years and still in force. Every such agreement and settlement is to have effect as if the Act had not passed. And S. 33 enacts that certain sections of the Bombay Land Revenue Code of 1879 are not to apply to the estates to which this Act applies. By S. 33 it is also provided that the word "talukdar" shall be substituted for the

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word "occupant," the words "registered talukdar" for the words "registered occupant," and the words "talukdars holding," or such words to that effect as the word occupancy when applying this Code of 1879 to the estates to which this Statute of 1888 applies. The seventy-third section of the Code provides that "the right of occupancy" shall, subject to the provisions contained in S. 56, and to any conditions lawfully annexed to the occupancy, save as shall be otherwise prescribed, be deemed to be a heritable and transferable property.

It is seriously contended, as their Lordships understood, that the effect of this substitution of the words "the right of occupancy" for the words "the right or interest of a talukdar" in or to his holding, is that a Kasbati's interest in a leasehold held for a term of years is changed in its nature and becomes a heritable and transferable property, notwithstanding that by the very conditions of the lease his interest is limited to a term, and he is restrained from alienation: and notwithstanding also that by S. 68 of this Code, it is enacted that an occupant is entitled to the use and occupation of his land for the period, if any, to which his occupancy is limited. These two sections, in their Lordships' view, plainly mean that a lessee, whether a true "Talukdar" or a "Thakur," "Mewassie," "Kasbati," or "Naik," is bound by the terms of his lease, one term of which is that he shall only occupy for the term of years for which a lease for years is granted, and *prima facie* no longer. S. 73 was amended by the Act of 1901, but the amendment is immaterial on this point.

Their Lordships are clearly of opinion that these Statutes do not bear in any way on the issue raised in this case. They think that the decree of the High Court cannot be sustained, and that the decision of the District Judge is equally erroneous. The fallacy underlying the former on the point as to the right of the respondent to occupy permanently is clearly revealed in the passage printed at page 495 of the Record in which the High Court deals with the lease of 1833:—

"There are no other provisions for forfeiture of the management. There is no "provision for renewal of the putta, but it is to be inferred from the nature of the "management and from the fact that the putta was for a term, that renewal was "contemplated. This inference is supported by both previous and subsequent "events: by previous events, because in 1823 permanent possession by the Kas-"batis was contemplated; by subsequent events, because the renewal did, in fact, "take place."

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Their Lordships, dealing with the legal rights of the parties alone, are clearly of opinion that the decrees of both courts are erroneous and should be reversed, that the main appeal, that of the Secretary of State, should be allowed, and the cross-appeal dismissed, and that judgment should be entered for the Secretary of State, dismissing the respondent's action. And they will humbly advise His Majesty accordingly.

The respondent must pay the costs here and below.

Solicitor for appellant: *India Office.*

Solicitor for respondents: *T. L. Wilson & Co.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

[FULL BENCH.]

Present:—Sir John Wallis, Kt., Chief Justice, Mr. Justice Ayling and Mr. Justice Sadasiva Aiyer.

Guda William ... *Plaintiff**

v.

Guda Karunamma ... *Defendant.*

Guda William v. Guda Karunamma.

Divorce Act. (IV 1869), Ss. 16 & 62—Decree for Divorce by District Court—Confirmation by the High Court—Reference by Head Clerk in the absence of the Judge—Power of High Court—Jurisdiction—Practice—Evidence Act, S. 112—Proof of non-access.

Where the Head Clerk of District Court in the absence of the District Judge made a reference to the High Court for confirmation of a decree for divorce passed by the District Judge. *Held*, (by the Chief Justice and Ayling, J.) following the uniform practice of the Court that the High Court could confirm the decree after giving notice to the parties without requiring the petitioner to appear and move for confirmation.

Per Sadasiva Aiyar, J. That neither under the Act, nor under the rules framed by the High Court under S. 26, has the District Judge any power to refer a decree for divorce to the High Court for confirmation. Even if a reference by the District Judge is contemplated by the Act the High Court cannot act on a reference made by the Head Clerk.

Held also that without an application by the person who wants the confirmation of the decree, the High Court, ought not to confirm the decree. *Forshaw* v. *Forshaw* [1] followed.

The legitimacy of a child can be rebutted only by strong conclusive proof of non-access of the parents at the time the child could possibly have been conceived.

Case stated under S. 17 Act IV of 1869 by the District Judge

* R. C. 10 of 1914. 18th March 1915.

1. (1909) I. L. R. 31 A. 61

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of Godaveri at Rajahmundry submitting for confirmation of the High Court the *decree nisi* passed in O. S. No. 15 of 1914.

Parties not Represented.

The Court delivered the following

Judgments: *The Chief Justice.*—It has always been the practice of this court since the passing of the Indian Divorce Act of 1869 to post and dispose of decrees sent up from the District Court for confirmation after notice to the parties without requiring the petitioner to appear and move for confirmation. I see no sufficient reason to depart from the practice which appears to me to give effect to the intention of the legislature. It was in the interest of poor suitors that jurisdiction in divorce was conferred upon District Judges instead of on a central Divorce Court as in England and it would be a restriction of the boon to require a petitioner who has obtained a decree in a District Court to take proceedings for confirmation in the High Court. The mere appearance of the petitioner would be no protection against collusion which is guarded against by the other provisions of S. 17 and as regards the possibility of the parties having died or come together again subsequent to the decree of the District Court the serving of notice seems a sufficient safeguard.

As to the facts the petitioner has no doubt failed to prove the specific act of adultery shortly after the marriage on which he relied, besides which condonation has been proved. But with regard to the allegation that the petitioner was not the father of the infant born to the respondent in September 1913 the District Judge who saw the witnesses has accepted the evidence of witnesses who if believed, in my opinion, sufficiently prove non-access on the part of the petitioner and misconduct on the part of the respondent. The case really turns on whether the husband had access to his wife about the time the child was conceived. The parties had been separated for some months before, when at the instance of the missionaries an effort was made to reconcile them. Plaintiff's 2nd witness speaks to going with the petitioner to her mother's house and finding her absent and to staying the night and their going over to Achutapuram where she was keeping a night school to adult men as well as boys. There does not seem to have been any opportunity of access on that occasion and the evidence in my opinion negatives anything

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of the kind. The fact of her having previously to this contracted a venerial disease which she did not accuse her husband of having given her and of her keeping the night school show the sort of woman she was. I think the adultery is sufficiently proved and would confirm the decree.

Ayling, J:—I agree.

Sadasiva Iyer, J:—This case is described as a case "referred under S. 17 of Act IV of 1869" for confirmation of the decree *nisi* passed by the District Court of Godavari in O. S. No. 15 of 1914" on the file of that Court. I have to make two remarks in connection with this. In the first place, S. 14, of the Act IV of 1869 does not call the decree pronounced by the District Court a decree *nisi*. It is only a Divorce decree passed by the High Court on its Original Side which is called a decree *nisi* in S. 16 of the Act. In the second place, there is no provision for the District Court referring the decree to this Court. S. 17 merely says that "every decree for dissolution made by the District Judge shall be subject to confirmation by the High Court." I am not aware of any rules passed by the High Court under S. 162 of the Indian Divorce Act enabling the District Court to make any such reference. I might further add that in this case I find that a Head Clerk of a District Court as the officer in charge in the absence of the District Judge from the station has made the reference on the 13th May 1914. Even holding that a reference by the District Court is contemplated by the Act and we are bound to act on such reference I think we must decline to act on a reference made by the Head Clerk of the District Court who is left in charge of the administrative duties and of the establishment during the absence of the District Judge.

I further think that even if a reference is admissible and is properly made, the person who wants the confirmation of the decree pronounced by the District Judge ought to make an application to this Court for such confirmation and without such an application I am inclined to hold with the Full Bench of the Allahabad High Court (See *Forshaw* v. *Forshaw* [1]) that we should not confirm the decree passed by the District Judge.

I might be permitted to quote the following from that Judgment:—"We are wholly unable to say whether or not the parties have come to terms and arranged their differences. It

1. (1909) I. L. R. 31 A. 5 1.

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may be that since the decree *nisi* was passed the petitioner and respondent have cohabited and the adultery has been condoned." I might further add that it may be that one of the parties has even died after the pronouncement of the decree by the District Court which is now nearly a year old. While I am not prepared to say that we have no jurisdiction to consider this case because there has been no proper reference and there has been no application by the party, I think that the practice might be introduced of requiring an application from the interested party. Most of the Indian Christians are, no doubt, very poor and hence, jurisdiction in divorce matters was given to the District Court so that, the expenses and trouble of going to the High Court of Madras and securing attendance of witnessess there might be avoided. But in such a momentous matter as confirmation of a divorce often involving the legitimacy of children, a petitioner might be expected to manifest at least the interest required to apply to the High Court therefore, and if it is too troublesome to go to Madras to put in the application, the rules might provide for his sending it through the District Court.

So much for the preliminary difficulties in this case:. On the merits also I am inclined to hold that it is not proved that the respondent has been guilty of adultery. The petitioner (husband is not at all a straightforward witness and his story that he caught in adultery with a man (now deceased) in broad day-light in a school-house a few days after the marriage is not worth a moment's belief. The respondent is no doubt proved to be a bold immodest woman. Her talking freely to other males and opening and conducting for some time a school for adult males do show her to be a confirmed coquette and flirt, but I am not prepared to hold that she has lived "the life of a public prostitute" as stated in paragraph 9 of the petition. In fact there is no evidence at all of her having led a life of promiscuous intercourse with all who sought her. (See *Roe* v. *Roe* [1], as to who is a public prostitute). That the petitioner went to her residence in January 1913 is admitted by the petitioner. He says he had no intercourse with her on that occasion. She says on the other hand that he had and she attributes to him the paternity of the child born to her in September 1913, between 8 and 9 months after this visit. He, no doubt, went to her with mediators in order to persuade

1. (1869) 3 Beng. L. R. Appx. 9.

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her to live with him. I, however, do not think it so very improbable that she did allow him to have his intercourse with her at that time though she refused to return to his place to live with him continuously. I am not prepared to brand the child born to her in September 1913 as a child born of the adultery of its mother with some unknown paramour having regard to the stringent provisions of S. 112 of the Evidence Act. That the mediator witness says that to his knowledge there was no access between the petitioner and the respondent when he went to her in January 1913 is of very little value. In *Atchley* v. *Sprigg* [1], it was said that the presumption of a child's legitimacy can be rebutted "if it is shown by strong, distinct, satisfactory and conclusive evidence that the husband whether before or after the marriage had not access to his wife." In the *Baroney of Saye and Sile* House of Lords Cases, Vol. I, page 507, it was held that circumstantial evidence showing that the husband and wife were living separately from each other at such a distance that they could not have had intercourse during the three or four months during which alone the child could have been begotten, was sufficient evidence. I do not think that in this case any facts proving non-access beyond reasonable doubt are proved, and I am not prepared on the mere denial of the petitioner to hold that he had no access to his wife in January 1913. I might add that there is clear evidence in this case that the petitioner who was anxious to get at his wife even in March 1913, has since begun to love another Native Christian woman and is therefore anxious to get rid of the respondent and that he is not a person of much delicacy of feeling. I would therefore on the merits also refuse to confirm the decree.

The Court:—Following the opinion of the majority the decree is confirmed.

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1. (1864) 33 L. J. Ch 3 .

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Mr. Justice Seshagiri Iyer.

Ramasami Goundan ... *Accused in Calendar case No. 54 of 1915 on the file of the Court of the Joint Magistrate of Pollachi Division.*

Ramasami Goundan *In re.*

Indian Penal Code, S. 228—Essentials of offence under—Duty of courts taking action under S. 228.

To constitute an offence under S. 228 of the Indian Penal Code, the Court has to be satisfied that the accused intentionally offered interruption to the Court.

An audible remark which had the effect of interrupting the Court is not enough to convict the accused.

In cases coming under the section, the Court is both prosecutor and judge and so the powers should be used only in exceptional cases. Courts taking action under S. 228 ought not to give room for the impression that they are unduly sensitive.

Case referred for the orders of the High Court, under S. 438 of the Criminal Procedure Code, by the District Magistrate of Coimbatore in his letter, dated 7th June 1915, Crl. R. C. No. 17 of 1915.

The District Judge of Coimbatore made the following reference to the High Court :—

Under Criminal Procedure Code, Section 438, I have the honour to report for the orders of the High Court the result of my examination of the records of C. C. No. 54 of 1915 on the file of the Joint Magistrate of Pollachi.

In this case the joint Magistrate, Pollachi, has proceeded under Criminal Procedure Code, S. 480, and has convicted and sentenced one Ramasami Goundan to a fine Re. one for an offence under S. 228, Indian Penal Code. The accused was a witness in another calendar case viz., No. 12 of 1915 on the file of the same Magistrate. When the Magistrate was examining defence witness 10 in the latter case the accused is stated to have addressed an audible remark to the witness and the Joint Magistrate has found that he thereby intentionally interrupted the proceedings of his Court. The only witness examined in the case was the Joint Magistrate's daffadar and he deposed that the accused made an audible remark to a defence witness No. 10 in C. C. No. 12 though he could not say what that remark was: The accused denied the offence.

Crl. R. C. 353 of 1915 C. Refd. 37 of 1915. 30th July 1915.

Ramasami Goundan *In re.*

Seshagiri Aiyar, J.

Granting that the accused did make a remark as deposed to by the Joint Magistrate's daffadar, there is nothing whatsoever either on the record or in the judgment of the case to indicate precisely under what circumstances or for what purpose the remark was made, or that it was made with the intention of disturbing or interrupting the proceedings of the Court.

The Joint Magistrate who was asked to explain this, reports that the accused addressed the remark in a manner which any reasonable man must know would interrupt the proceedings of the court, that the remark was in the nature of prompting the witness and that that fact was sufficient to show intention.

There is, however, as I have observed above, nothing on the record to indicate any intention on the part of the accused to interrupt the proceedings of the court and I do not consider that such an intention is a necessary presumption from the accused's action. Considering the status of the accused a Vellala cultivator—that action may with equal probability—have been due to ignorance or stupidity. In any case there must have been other evidence available to prove the offence, if any offence was committed, e.g., the 10th defence witness in C. C. No. 12 of 1915, or any others present in court.

I regret to have to trouble the High Court with a case of this paltry nature, and I do so because the Joint Magistrate seems to have been making too free a use of I. P. C., S. 228. *Vide* my letter D. Dis. No. 1181 M. of 1914, dated 20th October 1914, disposed of in High Court's Criminal Revision case Nos. 744 to 746 of 1914.

P. R. Grant for the Public Prosecutor on behalf of the Government.

The Court made the following

Order :—I am wholly unable to understand how on the facts stated by the Magistrate any offence was committed under S. 228, Indian Penal Code. The Magistrate says that the proceedings in his court were interrupted by the audible remark made by the accused. That is not enough to convict the accused. The Court has to be satisfied that the accused intentionally offered interruption to the Court. There are no materials on which the Magistrate could have come to the conclusion that the accused intended to insult him or to interrupt his proceedings. Courts who take action under S. 228 ought not to give room for the

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impression that they are unduly sensitive about their dignity. In cases coming under the section, the Court is both prosecutor and Judge; and it is therefore necessary to see that the powers are used only in exceptional cases. This is not the first instance in which the Magistrate took action under this section. Constant proceedings of this character will have a tendency to interfere with the proper administration of Justice as they would put the parties in fear of a possible summary punishment for acts which may be innocently committed. I set aside the conviction and direct the fine to be refunded.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present: Sir John Wallis, Kt., Chief Justice and Mr. Justice Coutts Trotter.

Mysore Balakrishna Rao ... *Appellant* (Plaintiff)*

v.

The Secretary of State for India in Council *Respondent (Defendant). represented by the Collector of Cuddappah.*

Balakrishna Rao v. Secretary of State for India.

Madras Forest Act (Act V of 1882), S. 6, 16—Reserved Forest—Omission to give notice—Proceedings without jurisdiction—Not cured by subsequent knowledge and failure to object—Inam title-deed—Construction—Besides poramboke—Unassessed waste land included—Inam register—Area under estimated—Effect of.

Where the Forest Settlement Officer failed to give plaintiff owner of the adjoining land the notice prescribed by S. 6 of the Madras Forest Act and the final notification under S. 16 was made declaring the land reserved land.

Held, that the proceedings of the Settlement Officer were without jurisdiction and could not affect plaintiff's right of action under the general law.

The irregularity was not cured by the plaintiff coming to know of the proceedings before the final proclamation and his failure to object.

Nusserwanjee Pestonjee v. Meer Mynoodeen Khan [1], *Saunby v. London County Council* [2], *Farrow v. Rathmines and Rashgar Improvement Commission* [3], *Rameshwar Singh v. Secretary of State for India* [4], followed.

The words "besides poramboke" in an inam title-deed are sufficient to confer rights in all unassessed land in the village and their effect is not to be cut down because the Inam Register which is before the survey under estimates the area of the unassessed land when there is no good ground for holding that the whole area was not intended to be granted

Appeal against the decree of the District Court of Cudappah, in O. S. No 70 of 1911.

K. Srinivasa Iyengar and *A. Krishnaswami Aiyar* for the appellant.

The Government Pleader for the respondent.

* A. S No. 208 of 1913. 12th March 1915.

1. (1856) 6 M.I.A. 134, 155.
2. (1906) A. C. 110.
3. (1892) A. C. 498.
4. I.L.R. 34 C. 470.

Balakrishna Rao v. Secretary of State for India.

The Chief Justice.

The Court delivered the following

Judgments:—*Chief Justice.*—This is a suit brought by the plaintiff against the Secretary of State in Council to establish his title to, and to recover possession of, certain lands in the village of Pullampalli which in the year 1905 were declared to be reserved forest by a notification under Section 16 of the Madras Forest Act, and have since been in the possession of Government. The plaint alleges that the declaration, and taking possession were illegal and *ultra vires* because the Forest Settlement Officer did not give notice to the plaintiff or his agent as is required by S. 6 of the Act before proceeding to constitute the lands a reserved forest. The plaintiff gave evidence that he was never served with the notice, and in the absence of any evidence to the contrary, the District Judge found that this was so, and this finding has not been seriously contested. He inferred however from Ex. 1, 2 and 3, that the plaintiff was presumably aware that the suit lands were being included in the Reserved Forest nearly a year before the publication of final notification under S. 16 and held that, as the plaintiff did not avail himself of his right under S. 17 to satisfy the Forest Settlement Officer, if he could, before the publication of the notification that he had sufficient cause for not preferring his claim within the period prescribed for the submission of claims in the notices issued in the year 1895, and so secure an investigation of his claims, the irregularity was cured and did not prevent the plaintiff being barred under that section. No authority had been cited before us in support of this view, and I am unable to accept it. Under the Act the Forest Settlement Officer is constituted a Court for the decision of claims to lands which it is proposed to include in a Reserved Forest as between Government and the claimant, and in the event of the claim being allowed he is required under S. 10, if no arrangement is come to with the claimant either to exclude the land in question from the proposed Forest or to acquire it for Government under the Land Acquistion Act. Under S. 6, he is required besides publishing notices calling for claims at the headquarters of each taluk in which any part of the land is situate and at every town and village in the neighbourhood of each land, to serve special notice to the same effect on every known or reputed owner or occupier of any land included in or adjoining the land proposed to be constituted a reserved forest or his agent or manager; and

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it is not disputed that the plaintiff as the registered inamdar of the village in which the suit land was situated should have received notice, under this section. It should also be stated that there is no evidence that the steps which were being taken under the Act came to the knowledge of the plaintiff until more than five years, after the issue of the proclamation under S. 6. In these circumstances, it is, I think, clear that the Forest Settlement Officer in the absence of the notice required by the section had no jurisdiction to make any decision affecting the rights of the plaintiff. Numerous cases might be cited in support of this position. But it is sufficient to cite the decisions of their Lordships in *Nussurwanjee Pestonjee* v. *Meer Mynoodeen Khan* [1], and *Saunby* v. *London Water Commissioners* [2]. In the latter, it was held by their Lordships that the Statutory Commissioners having proceeded without serving the notice required by the Act, the appellant had not lost his ordinary right of action for the trespass on his property. Reference may also be made to the forcible language of Lord Macnaughten in *Herron* v. *Rathmines* and *Rathgar Improvement Commissioners* [3] and to *Rameswar Singh* v. *Secretary of State for India* [4].

If, as I hold the notification issued under S. 16, is not binding on the plaintiff and his rights are not barred by S. 17, I agree with the District Judge that he is entitled to a decree. Under the terms of his Inam title deed, Exhibit K, his Inam tenure has been converted into a permanent freehold, to use the language of the grant; and the only question is, whether it includes the unassessed waste lands, in the village which have been included in the reserved forest. Exhibit K, acknowledges his title to a personal inam consisting of the rights to the Government revenue on land claimed to be 391·69 acres of dry and 287·69 acres of wet and situated in the shrothriem village of Pullampalli " besides poromboke ". The poromboke here mentioned obviously means the poromboke or unassessed waste of the shrothreim village in question, and this is the construction put upon the words in similar grants, in *Secretary of State for India* v. *Raghunatha Thatha Achariar* [1], and *Narayanaswami Naidu* v. *Secretary of State for India* [2] where however it is held that certain lands including the

1. (1856) 6 M. I. A. 134 at 155.
2. (1906) A.C. 110.
3. (1892) A. C. 498 at p. 528.
4. I. L. R. 34 C. 470.
5. (1913) 24 M. L. J. 31.
6. (1913) 24 M. L. J. 36.

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lands used for communal purposes, etc., do not pass under such a grant. The Inam Register, Ex. J., which was before the survey, no doubt underestimates the area of the Poromboke in the village; but there is no ground for interpreting the grant as not conferring the whole Poromboke of the village. The appeal must be allowed and the suit decreed for the plaintiff with costs throughout.

Coutts-Trotter, J.—I am of the same opinion. The act which we have to construe is an expropriating Act and to a certain extent ousts the jurisdiction of the ordinary courts of law in favour of tribunals consisting wholly or in part of executive officers. Certain machinery is provided by the Act for the purpose of giving notices to persons who may be injuriously affected by the Act and enabling them to prosecute their claims before the tribunal set up by the Act. It is conceded that in one respect the procedure outlined by the Act has not been followed in this case, inasmuch as no notice has in fact been served upon the appellant as a known or reputed owner of lands affected, in accordance with the concluding paragraph of S. 6 of the Act. It also appears that there was some evidence to show that the appellant in fact knew that it was proposed to include his lands in the new forest area, notwithstanding the absence of a notice directed to him personally. In these circumstances, it was urged on behalf of the respondent that the broad policy of the Act must be looked at; and that all that was essential to give jurisdiction under it was that the appellant *quo quo modo* should have knowledge in fact of the proposal to include his lands In support of this contention reliance was placed on the language of S. 6 and of S. 16. No doubt S. 6 fixes no limit of time within which the personal notice to owners must be given: and S. 16 fixes the date for notification of the reservation of the proposed forest only by reference to the time limited by the proclamation prescribed by the first part of S. 6. From that it is argued that the 2nd part of S. 6 is only directory, and that neglect to carry out its directions is a mere irregularity, which can be cured by proving that notice in fact reached the appellant. The appellant contends on the contrary that the sending of the notice prescribed by the 2nd part of S. 6, is as much a condition precedent to the exercise of the jurisdiction conferred by the statute as the issuing of the proclamation enjoined by the first. Looking at the language employed in the two parts of the section, its terms are as mandatory

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in the one as in the other; "the Forest Settlement Officer shall publish a proclamation" is followed by "the Forest Settlement Officer shall also serve a notice". Where such language is used I think its proper construction has been determined in a series of cases in the House of Lords and Privy Council, of which I need only refer to *Herron* v. *Rathmines and Rathgar Improvement Commissioners* [1]. The result of these cases in my opinion is that every such statutory mandate in an expropriating statute must be strictly observed, and that its observance is a condition precedent to the whole jurisdiction conferred. I therefore hold that the appellant never became amenable to the special jurisdiction of the Madras Forest Act, and that the present suit lies, if he can prove his title as Inamdar to the property sought to be afforested. That is a question of fact upon which, in my opinion, the evidence is conclusive in his favour.

This appeal having been posted to be spoken to this day, the Court delivered the following

Judgment:—It will not be necessary to remand the case to ascertain the amount of the measne profits as the parties have agreed without prejudice that they should be assessed at Rs. 75 a year. The appellants will be entitled to recover mesne profits at this rate up to date of delivery.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Sadasiva Aiyar and Mr. Justice Bakewell.

A.M. Ross, duly authorised Agent of certain Tea Companies and Labour Associations in Assam. *Appellant* *

v.

The Secretary of State for India in Council ... *Respondent.*

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Assam Labour and Emigration Act, VI of 1901—S. 22, cl. (3)—Illegal order of Collector closing depot—Liability of Government—Liability of Collector himself.—Remoteness of damage—Statutory powers—Acts done in pursuance of—Liability of appointing authority—Tortious acts of servants or agents—Liability of Government for—Defamation—Publication in execution of duty and not exceeding it—Liability of Government for.

The suit was to recover damages from the Secretary of State for India in Council, the claim being founded on the following facts, *viz.*, (1), that, purporting to act under S. 22, cl. (3) of the Assam Labour and Emigration Act, VI of 1901, the Collector and District Magistrate of Ganjam closed a labour recruiting depot at Berhampore, which was intended for the accommodation of coolies recruited on behalf of certain Tea Planting Associations in Assam; (b) that the Governor-in-Council

* O. S. No. 32 of 1913. 29th April 1915.

1. (1892) A. C. 498.

by a Government order ratified and confirmed the Collector's order closing the depot till that date; (c) that the Government in the said order made certain remarks which were defamatory of the plaintiff. The plaintiff claimed to have been appointed agent by the said Associations and to be entitled to a commission of Rs. 7-0-0 for every cooly recruited by him and alleged that by reason of the Collector's order he was prevented from recruiting coolies and earning his commission.

Held, by Sadasiva Aiyar, J: The Government could not be made liable for the of order the Collector, because, in purporting to exercise his statutory powers under S. 22 cl. (3) of the Assam Labour and Emigration Act, he was not acting as the agent of the Government, and as such, the Government could not also ratify the act so as to make itself liable.

There being no proof that in closing the depot, the Collector maliciously intended by his order to hit at the plaintiff's right to the benefit of the commission obtainable by him from his employers or that the Collector was actuated by any indirect motive against the plaintiff, the Collector himself even in his personal capacity, could not be made liable to the plaintiff.

Per Bakewell, J.: The plaintiff was neither an employer nor his licensed agent within the meaning of the Act; the business carried on by him was illegal; and there could be no right of action in respect of such business.

Even if plaintiff could be considered to be in th position of an employer, the suit was liable to be dismissed on the ground that there was no proof that the damage complained of by plaintiff was the consequence of the Magistrate's Act and that in any case it was too remote to give the plaintiff a cause of action.

Held, by Sadasiva Aiyar and Bakewell, JJ.:—The Governor-in-Council could not be held liable for publishing words concerning the plaintiff in the course of the official duties of the Governor-in-Council when it is not alleged that the publication was made maliciously and without reasonable and probable cause.

Per Sadasiva Aiyar, J.:—On the highest grounds of public policy, Government should not be made liable for the tortious acts of its agents or servants except probably for acts done in the course of those kinds of transactions, which even an ordinary private mercantile firm can enter into.

Rogers v. *Rajendro* [1], *Dutt* followed.

On appeal from the judgment of the Hon'ble Mr. Justice Wallis, dated the 6th day of February 1913, in the Ordinary Original Civil Jurisdiction of this Court in C. S. No. 51 of 1911.

C. P. Ramaswami Aiyar and *A. Krishnaswami Aiyar* for the appellant.

The Hon. Advocate-General (F. H. M. Corbett and *Barton* for the respondents.

The Court delivered the following

Judgments:—*Sadasiva Aiyar, J.*:—Plaintiff is the appellant. So far as this suit which is brought to recover damages against the Secretary of State for India in Council, is based upon the suspension and dismissal of Rama Sastry (a "local agent," of the Assam Planters), by the Collector and District Magistrate of Ganjam, the plaintiff gave up his contention that such suspension and dismissal were wrongful.

1. (1860) 8 M. I. A. 130, 1. L.

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The remaining facts on which the claim is founded are *(a)* that the Collector and District Magistrate on the 22nd February 1910 closed a labour-recruiting depot at Berhampore, that recruiting depot having been intended for the accommodation of coolies recruited on behalf of certain Tea Planting Associations in Assam, of which Associations the plaintiff had been appointed as agent; *(b)* that the Governor-in-Council by a G. O. dated 12th October 1910, ratified and confirmed the Collector's order closing the depot till that date; *(c)* that the Government on the said 12th October 1910 in the said order made the defamatory remark that "the conduct of Mr. Ross, (the plaintiff), was not wholly above suspicion" in the matter of the irregularities committed by the local agent, T. S. Rama Sastri, on account of which irregularities Rama Sastri's license as local Agent was cancelled by the Collector and District Magistrate.

The learned Chief Justice who tried this case on the Original Side dismissed the suit making certain observations in his judgment which observations might be stated as follows, using in great part the words of the learned Chief Justice :—

1. The Collector's order of February 1910, closing the depot to recruiting by the garden sardars working under the Assam Labour and Emigration Act VI of 1901, on behalf of the Assam Planting Associations was *ultra vires*.

2. The Secretary of State in Council is not legally liable for the tortious acts of the Collector of Ganjam or of the Governor of Madras in Council. If S. 416 of the old Civil Procedure Code really laid down that the Secretary of State can be made liable for the tortious Acts of a local Government or of an officer of that Government notwithstanding that the East India Company would not have been liable for such acts, that section is *ultra vires* of the Indian Legislature, as opposed to the provisions of the Indian Councils Act of 1861. If the decision in *Vijiayaraghava* v. *Secretary of State for India* [1] holds otherwise, it is no longer an authority as opposed to the Privy Council decision in *Secretary of State for India* v. *Moment* [2]. See also *Shivabhajan* v. *Secretary of State for India* [3]. In 2 Morley's Digest 307 *Dhackjee Dadji* v. *The East India Company* Sir Erskine Perry held that the only ratification which would bind the company was a

1. (1884) I. L. R. 7 M. 466.
2. (1912) I. L. R. 40 C. 391 (P. C.) s.c. 24 M. L. J. 459.
3. (1904) I. L. R. 28 B. 314.

ratification by the Court of proprietors itself. This is not a case in which a petition of right would lie against the Crown. Hence this action against the Secretary of State who is not alleged to have himself ratified the Collector's Acts or the local Government's Acts cannot lie.

3. In *Tobin* v. *Reg* [1], it was held that, independently of the doctrine that the king can do no wrong, the Crown could not be made liable for the action of a Government servant purporting to act *under a statutory power conferred upon him* because the action of a Government servant purporting to exercise a statutory power cannot be held to be an act done as an agent of the Crown. See *Shivabhajan* v. *Secretary of State for India* [2]. There can be no ratification by the principal of such an act, as such an act was not done on behalf of the principal.

4. As regards the alleged libel by the Madras Government, the Secretary of State (defendant) is not liable for reasons already stated as the publication of the libel was not (*a*) made under the orders of the Secretary of State, or (*b*) made on his behalf and ratified by him. (See *Jehangir* v. *Secretary of State for India* [3]).

5. In *Grant* v. *The Secretary of State for India in Council* [4], it was held that the Secretary of State was not liable for the publication of an alleged libel in the Fort St. George Gazette as, at all events, the libel was not alleged to have been published maliciously and without reasonable and probable cause; See also *Chatterton* v. *The Secretary of State for India in Council* [5].

In the decision of this appeal, I shall confine myself to the following questions on which we have heard arguments from the appellant's learned Vakil, Mr. C. P. Ramaswami Aiyar :—

(1) Whether the Collector's act in closing the plaint depot gave a cause of action to the plaintiff *against the Government*.

2. Whether even the Collector and District Magistrate of Ganjam who passed the order closing the depot is liable *to the plaintiff*.

3. Whether assuming that the remark in the G. O. referred to in the plaint is libellous and was published, the statement is

1. (1864) 33 L. J. C. P. 199 at 210.
2. (1904) I. L. R. 28 B. 314.
3. (1903) 6 Bom. L. R. 131.
4. (1877) 2 C. P. D. 445 at 453.
5. (1895) 2 Q. B. 189.

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privileged and the Governer-in-Council cannot be made liable for making and publishing that statement.

There can be no doubt that the Collector and District Magistrate in ordering the closing of the depot intended to use the powers given to him by S. 22, Cl. 3 of the Assam Labour and Emigration Act VI of 1901. That clause says: "Where the Superintendent" (in this case the Collector and District Magistrate) "considers that any depot is unhealthy or has *become unsuitable for the purpose for which it was established* he may, by order in writing, prohibit the use of the depot for the reception and lodging of labourers."

I am clear that the Government cannot be made liable for illegal orders made by the Collector and District Magistrate purporting to use the powers given by this statute law, the authority of *Tobin* v. *Reg* [1] followed in *Shivabhajan* v. *Secretary of State for India*[2] being, in my opinion, almost conclusive on this point. The District Magistrate who purported to use the powers given by the statute law cannot be treated as the Agent of the Government of Madras nor, can the Government ratify that act so as to make itself liable for that act, because that act was not done *on its behalf* and the Government cannot be treated as a principal and the District Magistrate as its agent when the latter purported to exercise statutory powers. "When the duty to be performed is *imposed by law*" on the agent......."the employer is not liable for the wrong done by the agent in such employment." (See *Tobin* v. *Reg* [1] and *Nireahe Tamahi* v. *Baker* [3]. Before leaving this part of the case I might finally add that on the highest grounds of public policy, the Government should not be made liable for the tortious acts of its agents or servants except probably for acts done in the course of those kinds of transactions, which even an ordinary private mercantile firm can enter into. This, namely, the civil irresponsibility of Government "for tortious acts" of its agents has been assumed as undoubted law in *Rajevo* v. *Rejendro* [4] and though it may be argued that the observation was obiter, the obiter of the Privy Council expressed through the mouth of that most eminent jurist, His Lordship the Right Hon'ble Dr. Lushington ought, I think, to be followed by this Court.

1. (1863) 33 L. J. C. P. 204, 210.
2. (1904) I.L.R. 28 B. 314 at 325.
3. L. R. (1901) A. C. 561 at 575.
4. (1860) 8 M. I. A. 103 at 131.

I am further of opinion that the District Magistrate himself even in his personal capacity cannot be made liable *to the plaintiff* for the order made by him to close the depot, though it was an illegal order. I shall assume that the depot was a place which was provided not only by the local agent (who was bound to provide such a depot under cl. 8 of Rule 11 made by the local Government in exercise of the power conferred on the Governor-in-Council by S. 91, cl. (*b*) of the Assam Labour and Emigration Act) but that that same depot was also the depot provided by the planters' garden sardars under S 62, cl. (1) of Act VI of 1901. The illegal order of the District Magistrate affected directly only the local agent and then it affected the garden sardars; the local agent's license having been probably cancelled, he had no cause of action against the District Magistrate. Assuming that the garden sardars and even the plaintiff's employers whose labour supply was cut off are entitled to sue the Collector and District Magistrate for damages, they have not brought any suit. It is the plaintiff who has lost his expected commission as agent that has brought this suit. No malice or fraud or deceit is alleged as against the Collector and District Magistrate. Has an agent a right to bring a suit for recovery of damages incurred by him against a person who illegally prevented his principal's garden sardars from taking their coolies to the Emigration depot if the tortfeasor is not proved guilty (*a*) of personal malice directed *against the agent* or of fraud or deceit (*b*) or, if it is not proved that his object was to injure the plaintiff's legal right (to receive commission from his employers for coolies sent through the depot)? The Collector and District Magistrate was under no obligation created by contractual, statute or any other law to the plaintiff in the plaintiff's individual capacity. The Collector's action in closing the depot was passed against the local agent directly and indirectly against the garden sardars and still more indirectly against the planters. So far as that action affected the plaintiff's pocket, it did so in the third or fourth degree of remoteness, so to say. Passages from some of the judgments, in well known cases of *Lumley* v. *Gye* [1], *South Wales Miner's Federation* v. *Glamorgon Coal Co.* [2], and *Quinn* v. *Leathem* [3], might be quoted (and they are usually quoted in

1. (1853) 2 E. & B. 216. 2. (1905) A. C. 239.
3. (1901) A. C. 495 at 510.

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those cases where a person who is not directly affected by an alleged tortious act seeks to recover damages) which passages, taken apart from the context can ingeniously be interpreted to support claims by a person most remotely connected with the wrongful act, for recovery of damages of as remote a kind. (See the observations of *Lord Halsbury* in *Quinn* v. *Leathem* [1], itself as to the right mode of interpreting such passages). As Mr. Justice Joyce put it in *National Phonograph Co., Ltd.* v. *Edison Bell Consolidated Phonograph Co., Ltd.* [2], "What was said was never intended to be, and ought not to be, treated and construed as an article of a Code or a section of an Act of Parliament. " In *Allen* v. *Flood* [3]. six very learned Law Lords formed the majority and three other learned lords including Lord Halsbury were in the minority. In *Quinn* v. *Leathem*, [1], the House of Lords, lead by Lord Halsbury without overruling *Allen* v. *Flood* [3] explained its real effect. Even Lord Halsbury who seems to have gone furthest in his judgment in *Allen* v. *Flood* [3] in favour of the claims of a plaintiff who is injured by the defendant's bringing about, a breach of relations between plaintiff and a third party said that the defendant should be held liable if he "*maliciously* and wrongfully *with intent to injure the plaintiffs* intimidated and coerced" the third party "not to enter into contracts with the plaintiffs." (I need not say that the question of remoteness of damages is much more strictly considered against a plaintiff who makes a claim based on other torts committed by a defendant than the tort of inducing a breach of contractual relations of a third party with the plaintiff. Even as regards cases of the procuring of a breach of contract. See *Rigby L. J.* in *Exchange Telegraph Company* v. *Gregory & Co.* [4] and Justice Joyce's remarks at page 350 (1908) 1 Ch.

In the present case, there is not a word in the plaint to indicate that the Collector and District Magistrate in closing the depot maliciously intended by his order to hit at the plaintiff's right to the benefit of the commission obtainable by the plaintiff from the plaintiff's employers, or that the Collector and District Magistrate was actuated by any in direct motive directed against the plaintiff. I am clear that even if the garden sardars and the planters have claims for damages against the Collector (on which I express no opinion), the plaintiff who is an agent of the

1. L.R. (1901) A. C. 495 at 510.
2. (1908) 1 Ch. 335 at 349.
3. L.R. (1898) A. C. 1.
4. (1895) 1 Q. B. 147 at 157.

planters has no legal claim to recover damages for any injury caused to himself pecuniarily and not to his employers.

On the question of the alleged liability of the Governor-in-Council for defaming the plaintiff, I have nothing to add to the reasons given by the learned Chief Justice (in which I concur) for holding that the Governor-in-Council is not liable for publishing words concerning the plaintiff in the course of the official duties of the Governor-in-Council when it is not alleged that the publication was made maliciously and without reasonable and probable cause.

In the result, I would dismiss the appeal with costs.

Two Counsel certified.

Bakewell, J.:—By virtue of S. 3 of the Assam and Labour Emigration Act, 1901, and the notification of the Local Government made thereunder, all persons are prohibited from recruiting, engaging, inducing or assisting any native of India to emigrate from certain parts of the district of Ganjam to any labour district of Assam, otherwise than in accordance with the provisions of chapter III and IV of the Act; and under S. 164 of the Act any person who knowingly does or attempts to do any of the acts so prohibited is punishable with imprisonment or fine or with both. Under S. 4 of the Act, the Local Government has appointed certain of its officers by virtue of their official position, to exercise the powers and perform the duties therein mentioned. The general scheme of the Act is that the acts mentioned shall only be done by particular persons duly licensed by the specified authority, under the supervision and control of specified officers and in a particular manner; and the different classes of licenses and their respective powers and duties are carefully enumerated and described.

The Act provides that every intending emigrant shall be brought by the recruiting agent before a registering officer, but the local Government has enabled certain licensees termed "local agents" to perform the duties of this officer. The 'local agents' represent the employees of the emigrants in all matters connected with the supervision of garden sirdars under chapter IV of the Act (S. 64) the garden sirdar being a person employed on an estate and deputed by his employer to engage labourers (S. 2, (1) (h). Every garden sirdar is bound under S. 62 to provide sufficient and proper accommodation in a suitable place for the labourers or

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persons intending to become labourers, collected by him and under S. 68 to produce them before the registering officer.

The plaintiff owns a building at Berhampore, in the district of Ganjam, which has been used by numerous garden sirdars working in the district as a joint depot for the accommodation of the labourers collected by them. In his evidence, the plaintiff said, "the depot belongs to me. I purchased it. I own the building. I did not rent it to my employers I bought it out of the commission paid to me..............Now it has been passed as a depot under chapter IV of the Act since 1906. It is a place of accommodation which sardars are bound to maintain.

The plaintiff holds powers of attorney from various tea companies and superintendents of companies owning tea gardens in Assam, who are 'employers' within the Act: an 'employer' being the chief person for the time being in charge of any estate upon which labourers are employed (S. 2 (1) (f). In his evidence the plaintiff said that the superintendents were resident in Assam and the chief authorities on the spot; 'they hold powers of attorney from the companies. In 1906, I held a contractor's license. I gave it up that year. Since then I have taken no licence. I first began to work with local agents about October or November 1906, if I remember right, and continued up to the present time, I was working with local agents.' In paragraph 3 of his plaint, he alleges that various labour employers in Assam have nominated him 'as their emigration agent for the Madras Presidency for the purpose of securing coolies for labour on the several tea estates. The plaintiff holds general powers of attorney from the several companies aforesaid and by agreement with them is entitled to be paid Rs. 7 for every cooly recruited by him;' and in paragraphs 8 and 11 he says 'The plaintiff has several local agents working under him and several garden sardars engaged in recruiting.................Both the sardars and the local agents mentioned above and working on behalf of the various tea Companies and employers of labour are placed under the directions and superintendence of the plaintiff and work under him subject to his orders. And the depot mentioned above is also maintained under his supervision and control.'

In his evidence the plaintiff speaks repeatedly of 'my local agents' 'my depot' and 'my business.'

In February 1910 the District Magistrate and Superintendent of Emigrants, suspecting that the local agent at Berhampore was

collecting coolies from parts of the district of Ganjam in which recruiting was absolutely prohibited under the Act, suspended his licence and issued orders to the local officials to close the plaint depot, which was under the superintendence of this agent. The plaintiff claims that these acts of the Magistrate were unauthorised and *ultra vires*, that they have resulted in stopping the work of emigration, have 'interfered seriously with plaintiff's business' and have prevented him from earning his commission of Rs. 7 per head of adult cooly remitted and forwarded to Assam under his supervision and of the local agent." The plaintiff in his cross-examination and his vakil in his argument before us, contended that he was in the position of an employer, and not one of the agents mentioned in the act, but a kind of diplomatic agent between the employers and the local authorities. It is, however, perfectly clear from the allegation of the plaint and the plaintiff's evidence that he has been carrying on the business of a wholesale emigration agent and supplying tea planters in Assam with labourers at a fixed rate per head, and that the injury which he complains of is the damage caused to his own business.

I think that the act contemplates only two classes of persons to whom it shall be lawful to carry on this business, namely the employer, and the employer's licensed agent, and that the plaintiff is not included within either of these classes and was therefore prohibited from carrying on this business and was criminally liable for so doing. The only argument of the learned Vakil for the plaintiff when this aspect of the case was put to him was that this point was not taken before the learned trial Judge, and that argument might avail him in most cases; but this court cannot possibly ignore the facts that the plaintiff has been carrying on an illegal business and that his complaint is that the defendant and his agents have interrupted its course and prevented him from reaping its profits. I am of opinion that this suit might have been dismissed on the ground that the plaintiff has no right of action in respect of an illegal business.

If the plaintiff's contentions were correct, and he should be considered to be in the position of an employer I am still of opinion that he has no remedy. His Vakil has abandoned the first part of the case, the suspension and subsequent dismissal of the local agent, and has relied upon the closing of the plaintiff's depot, and the latter act did not result in any direct damage to the plaintiff or his employers. The plaintiff has not shown

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that the garden sardars could not accommodate their labourers in other suitable places, and could not register their coolies with the Government registering officers, and that the business of his employers could not be carried on without using this building, and the evidence goes to show that the stoppage in the flow of emigrants resulted from the plaintiff's attempt to continue the system of registration by a 'local agent,' and the resistance thereto of the District Magistrate. The latter's power of appointing local agents is discretionary, (S. 64 (1)) so that the plaintiff could not base his claim upon a refusal to appoint. It has not been shown that the District Magistrate was aware of the terms of the contract between the plaintiff and his principals, or of the manner in which a stoppage of the flow of emigrants would injure the plaintiff. The only evidence on this point appears in Mr. MacMichael's cross examination, 'Q. You know that by this order (that is to close the depot) you would not only be causing loss to these tea associations but also to Mr. Ross personally? A. I knew in a general way that Mr. Ross was commonly interested. Q. And therefore that he would be financially a loser by this order? A. Probably.'

The District Magistrate cannot be presumed to have known that the plaintiff was remunerated in a manner which suggests an active recruitment of labourer by him, and an infringement of the provision of the Act. The doer of an unlawful act is liable for its ordinary consequences, but not for consequences, which he did not and could not reasonably be expected to foresee (*Sharp* v. *Powell* [1]), and I am of opinion that the District Magistrate could not be expected to foresee that his act in closing the depot would result in so injuring the business of the plaintiff's principals that further damage would result to the plaintiff himself. The observations of Lord Penzance in *Simpson* v. *Thomson*[2] relate to a negligent act, but indicate the manner in which the court will limit the liability of a tortfeasor.

I am of opinion that the plaintiff has failed to show that the damage complained of was the consequence of the Magistrate's act, and that in any case it is too remote to give a cause of action.

I agree with the judgment of the learned Chief Justice with respect to the claim for damages for defamation and with the order proposed by my learned brother.

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1. (1872) L. R 7 C. P. 253.
2. (1877) L. R. 3 A. C. 289.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Spencer and Mr. Justice Coutts Trotter.

Ullattil Kalathil Nethiri Menon ... *Appellant* * *(Plaintiff)*.

v.

Mullapulli Gopalan Nair and others ... *Respondents* *(Defendants)*.

Ullattil Kalathil Nethiri Menon *v.* Mullapulli Gopalan Nair.

Trust, charitable—Uralans—Execution—Document drawn for execution by all—Execution of document by the majority—Whether operative—Intention—Payment to one of several trustees—No authority to receive—Validity—Trusts Act, S. 42.

The majority of a body of charitable trustees can legally bind the whole body. *Wilkinson* v. *Malin* [1] *In re Whiteley and Bishop of London* v. *Whiteley* [2] and *Teramath* v. *Lakshmi* [3] referred.

It is a question of intention in each case whether a document drawn up for execution by several persons was to be operative only if all should execute it, or otherwise. *Sivasami Chetti* v. *Sevugan Chetti* [4] *Latch* v. *Wedlake* [5] referred.

Where there are several trustees payment to one of them who has no authority either actual or by estoppel to receive and give discharge is not a valid payment.

"Any trustee or trustees" in S. 42 of the Trusts Act mean the trustee where there is only one and all the trustees where there are more.

Ram Babu v. *Committee of Rameshwar* [6] dissented from.

Second Appeal from the decree of District Court of South Malabar in A. S. No. 306 of 1912 preferred against the decree of the Court of the District Munsif of Ottapalam in O. S. No. 29 of 1911.

[The facts are sufficiently stated in the judgment].

C. V. Anantakrishnaiyar and *Eromon Unni* for Appellant. Two questions arise for your Lordships's consideration. (1) Whether when the majority of trustees decide to grant a lease of trust property after giving notice to the remaining trustees of their intention to do so and subsequently grant a lease, such lease is valid. (2) Whether the receipt which the defendants 1 to 6 had obtained from two of the trustees only is valid and binding on plaintiff. *Sivasami Chetti* v. *Sevugan Chetti* [4], which is relied on by the Courts below in support of their view that Ex. B is invalid because

* S. A. No. 489 of 1913 — 30th July 1915.

1. (1832) 2 Tyrwhit 544.
2. (1910) 1 Ch. 600.
3. (1882) I. L. R. 6 M. 270.
4. (1901) I. L. R. 25 M. 389.
5. 11 A. & E. 959.
6. (1899) 1 Bom. L. R. 667.

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9th defendant did not join in executing it, is inapplicable. The case in Sivasami Chetti v. Sevugan Chetti [1], was one of incomplete contract. My submission is that in the case of public trusts, the majority of trustees can act so as to bind the trust, notwithstanding the dissent of the minority

See S. A. 700 of 1913. Halsbury's Laws of England, Vol. 10 p. 400, S. 719.

With regard to the second question, the law is that in the case of public trusts, payment to be valid must be made to the majority of trustees. Ex. I, though executed by three trustees, was really executed only by two, because the finding of the Court of first Instance was that the third man was not a trustee at all.

[*Coutts Trotter, J.*—Why cannot a trustee sign by his agent?]

He can; but the evidence is to the effect that the 11th defendant's Anandravan was claiming against the 11th defendant. For authority for the position that payment to the majority only is good, see Perry on Trusts, Vol. 1, Ss. 412-413. *Teramath* v. *Lakshmi* [2], *Kunhan* v. *Moorthi* [3], Lewin on Trusts p. 290.

The Courts below are wrong in holding that payment to any one of the trustees is valid. The decision of the Full Bench that payment to one of two payees of a promissory note is a good payment is inapplicable to this case because the question here is as to who is entitled to receive the money.

G. S. Ramachandraiyar for respondents. The law is that one of several joint promisees is entitled to give a good discharge to the promisor. The case of trust is no exception to this rule at least in cases of rents and dividends. This is the stricter rule of the English law. In India, however, the rule is not confined to those two cases. The distinction is pointed out in *Rambabu* v. *Committee of Rameshwar* [4].

Ordinarily one trustee has power to receive money payable to the trust. If, however, his power is withdrawn and the withdrawal is communicated to the tenant, payment made by him thereafter to that trustee is not valid. In this case, there is no

1. (1901) I. L. R. 25 M. 389.
2. (1882) I. L. R. 6 M. 270.
3. (1910) I. L. R. 34 M. 406.
4. (1899) 1 Bom. L. R. 667.

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allegation on the other side that the power of the 9th and 12th defendants was withdrawn and that the withdrawal was communicated to defendants 1 to 6 before payment.

See Lewin on Trusts (10th Ed.) p. 241. Godefroi on Trusts (2nd Ed.) p. 231. The case may be looked at from another aspect. The relationship between the tenant and his landlord is purely contractual and the mere fact that the contractees happen to be trustees of an institution will not take the case out of the rule of law applicable to payments by a promisor to one of several joint promisees. See *Annapurnamma* v. *Akkayya* [1].

C. V. Anantakrishnaiyar in reply. The decision of the F. B. does not apply, because in the case of a lease by several trustees of a trust, there is only one promisee, *viz.*, the trust. S. 45 of the Contract Act is therefore inapplicable. Further the full bench decision refers only to cases of promissory notes and mortgages. It was not a case of a trust at all.

Rambabu v. *Committee* of *Rameshwar* [2], was a case of delegation of management to one trustee. Halsbury Vol. 28 p. 143 shows that such delegation is not invalid. The onus is on the respondents to show that payment to two of the trustees only is not a collusive one. The courts below are wrong in throwing the onus on the majority of the trustees or on the assignee from them.

[*Coutts Trotter, J.*—*Rambabu* v. *Committee* of *Rameshwar* [2], does not quote S. 42 of the Trusts Act rightly at all. That section makes it clear that when there are more trustees than one payment must be to all of them.]

[G. S. Ramachandraiyar referred to 4 Ch. app. 433.]

Lewin at p. 298 also says that in case of receipts, an executor is in a different position from that of a trustee.

Coutts Trotter, J.—If your contention is right, must you not say that 36 M. 544 F.B. is wrong?

My submission is that it is correct, but inapplicable because there is only one contractee in the case of a trust, *viz.*, the trust itself.

1. (1912) I. L. R. 36 M. 544 (551), F. B. S. C. 24 M. L. J. 333.
2. (1899) 1 Bom L. R. 667.

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[*Spencer, J* :—That may be so if there is no contract. Where there is a contract between the trustees and a stranger, the trustees are the contractees and payment to one of them comes within the ruling of the Full Bench.—]

See *Annapurnamma* v. *Akkayya* [1].

Again if the law is that one of several trustees alone can receive payment and give a good discharge, it must follow that other trustees cannot deprive him of that power without his consent.

G. S. Ramachandraiyar.—The words "a trustee" include the body of trustees if there are more than one, because the singular includes the plural. But the expression "any trustees" can only mean one or some of the trustees where there are more than one. It cannot mean the entire body of trustees. Hence S. 42 of the Trusts Act is in my favour. See also Perry on Trust Vol. 1 S. 334, Underhills' Law of Trusts and Trustees at 305 art. 51.

C. V. Ananthakrishnaiyar referred to Underhill p. 292, S. 50.

The Court delivered the following

Judgment:—The facts of this case are reasonably clear, and can be shortly stated as follows:—Defendants 9 to 13 are the uralans or trustees of a temple *known as the Tiruvegapura Devaswom*, and the lands referred to in the suit are the property of the temple, and at the period material to this suit the management of the property of the temple was vested in the whole body of uralans. In 1904 the lands in question in this case were mortgaged to the 1st defendant on behalf of the tavazhi of Defendants 1 to 6 with a corresponding obligation on them to pay certain rents and revenues while in possession to the uralans (Exhibit A). In this state of things, the ninth defendant who appears for some reason to have been on bad terms with his fellow uralans, brought a suit against them, obtained a decree, and attached in execution the moveables of the temple, including the vessels and jewels necessary for the performance of the daily worship. It thereupon became an urgent matter to free the vessels and jewels, and the plaintiff came forward with the requisite funds. Meetings

1. (1912) I. L. R. 36 M at 549. s.c. 24 M. L. J. 333.

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of the uralans were held which the 9th defendant though summoned refused to attend, and it was agreed that the plaintiff should be reimbursed by making over to him certain of the rents and revenues due under Ex. A. For this purpose a karar was drawn up, Exhibit B, and it is on this document that he brings his action. As drawn up, the contracting parties are expressed to be all the five uralans of the one part and the plaintiff of the other part; but the 9th defendant could not be got to execute it and in fact never did execute it. Finally it was executed by the remaining four uralans on the 24th April 1909 and handed to the plaintiff, who forthwith paid into Court the monies necessary to release the moveable property of the temple. When the plaintiff endeavoured to recoup himself by collecting the monies due to him under Exhibit B, he was met by a refusal based upon various grounds and among them the allegation that the monies had already been paid to defendants 9 and 12, and in support of this allegation a receipt was produced, dated 27th November 1910 and signed by defendants 9, 12 and the anandravan of the 11th defendant tarward (Exhibit I). He thereupon instituted the present suit; so far he has failed in both Courts below, and he now comes in second appeal before this Court. No one conversant with the facts of this case can fail to entertain strong suspicions that the alleged payment to the 9th and 12th defendants was a fiction, and Ex. I a sham document concocted to defeat the plaintiff's just claim; and that was part of his case in the Courts below." The manner in which this issue was treated below is most cursory and unsatisfactory; however, both Courts have found that the payment was made; that is a finding of fact in support of which there was no doubt some evidence, and we must accept it here. That being so, two questions only arise for our decision. First, was Ex. B. a valid document or was it vitiated by the fact that only four of the five contracting trustees executed it ?; and secondly, was the payment evidenced by Exhibit I, a good discharge to the defendants from the plaintiff's claim ? At one time a third point was suggested, viz., that Exhibit B, only effected an assignment of an actionable claim; but this was not seriously pressed, and is at once refuted by an examination of the documents. As to the first point, the law is well settled and clearly understood both in this country and in England. The majority of a body of charitable trustees can legally bind the whole

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body (*Wilkinson* v. *Malin* [1]. *In re Whitely: Bishop of London* v. *Whitely* [2], and *Teramnath* v. *Lakshmi* [3],) but if a document is drawn up in the name of all, and it is the intention of the parties that all should execute it, it will be incomplete and inoperative till all have done so. See *Sivaswami Chetty* v. *Sevgam Chetti* [4], *Latch* v. *Wedlake* [5], It is a question of fact as to what was the intention of the parties. In this case the District Munsif has found as a fact that they intended the document to be executed by all the five trustees, and the District Judge has accepted his finding; if there is evidence to support that finding we cannot interfere with it in second appeal. If there was no evidence to support it, it is our duty to set it aside. Upon a careful consideration of the facts, we think that not only was there no evidence in support of this finding, but that all the evidence points wholly and conclusively the other way. The document was drawn up certainly as early as the 17th March 1909, as on that day the four trustees sent an urgent notice to the 9th defendant informing him that it was drawn up, that his signature to it was required, and that if he did not sign it, the other four would sign it without him and "gave it the same effect as if he had also taken part" (Exhibit C.). Another equally urgent notice in similar terms was sent to the 9th defendant on the 9th April, Exhibit. C.). As he did not answer these communications, the document was executed by the other four trustees on the 24th April and handed to the plaintiff, who thereupon paid the money in satisfaction of the decree. The Judges below have been misled by an answer in the plaintiff's cross-examination, which appears in the deposition as follows:—"the intention when Exhibit B. was written was that 9th defendant should also execute it." That is doubtless perfectly true; but the learned Judges have overlooked the fact that more than a month elapsed between the writing of the document and its execution; that during that month the 9th defendant had been asked repeatedly to sign, and had failed to do so, and that the remaining uralans had announced their intention of signing themselves and delivering the document to the plaintiff. The intention of the uralans is sufficiently evidenced

1. (1832) 2 Tyrwhit, 544.
2. (1910) 1 Ch. 600.
3. (1882) I. L. R. 6 M. 270.
4. (1901) I. L. R. 25 M. 389.
5. 11 A. & E. 929.

by their own words in Exhibits C, and C-2; that of the plaintiff is equally manifest from the fact that as soon as he got the document signed, he parted with his money. We think that there was no evidence to support the finding of the Lower Courts, and we set it aside and declare Ex. B to be a valid and binding document.

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There remains the question as to whether the payment to two of the five trustees is a valid payment. There is no doubt that even one out of many trustees can receive and give a good discharge for rent and similar payments of income, if he has or is held out by his co-trustees as having authority to do so. Here it is not contended that the two uralans had any such authority actual or by estoppel. But it is said that though the Indian Trusts Act does not apply to charitable trusts, its provisions should guide us by analogy in matters of this sort; and that was the view adopted in *Rambalu* v. *Committee of Rameshwar* [1]; and that S. 42 of the Indian Trusts Act if applied validates this payment. The Court in that case (Jenkins, C. J. and Ranade, J.) applied the provision of S. 42 of the Act to a case of a charitable trust; and proceeded to give an interpretation of the section. It runs as follows:—

"Any trustees or trustee may give a receipt in writing for any money, securities or other moveable property payable, transferable or deliverable to them or him by reason, or in the exercise of any trust or power; and, in the absence of fraud, such receipt shall discharge the person paying, transferring or delivering the same therefrom, and from seeing to the application thereof, or being accountable for any loss or misapplication thereof."

It will be noticed from the report of the Bombay case that the learned Judges quote the section as beginning "any trustee may", whereas the words are "any trustees or trustees may." They proceed to interpret the section as meaning that any number of a body of trustees may give an effectual receipt for a payment made to him solely. We do not agree with this decision, and we do not think that the learned judges would have decided it as they did, if their attention had been drawn to the sections of the English Statutes upon which the Indian section is modelled. These sections are 23 and 24 Vict. C. 149, S. 29; 22 and 23 Vict, C. 35, S. 33; and 44 and 45 Vict. C. 41, S. 36. Before the first of

1. (1899) 1 Bom. L. R. 667.

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those enactments, a person who paid money over to trustees was responsible to the *cestui que trust* for seeing to the proper application to the trust of the monies so paid. The object of the English sections (their purport is the same, but they apply to different classes of trust) was to put an end to so great a hardship, and to discharge those who in good faith paid trustees from any further responsibility as to the disposal of the monies. Such being the origin of the English sections, we think it is clear that on their true construction the words "any trustee or trustees" mean "the trustee where there is only one, the trustees where there are more;" and we see no reason for applying a different construction to the words of the Iudian Trusts Act. Accordingly we hold that the payment to the 9th and 12th defendants, and the receipt, Exhibit I, failed to discharge defendants 1 to 6, and leaves them no answer to the plaintiff's claim.

The appeal is allowed with costs in all courts, and the plaintiff must have a decree in the terms of his plaint except as regards the rent due for the Malayalam year 1080, which is not now pressed. In default of payment within 6 months, the properties in suit must be sold.

PRIVY COUNCIL.

Present:—Viscount Haldane, Lord Shaw, Sir George Farwell, Sir John Edge and Mr. Ameer Ali.

[On Appeal from the High Court at Bombay.]

Merwanji Muncherji Cama and another ... *Appellants*.*

v.

The Secretary of State for India in Council ... *Respondents.*

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Merwanji Muncherji Cama *v.* Secretary of State for India.

Bombay City Land Revenue, Act II of 1876—Object—Register of titles—Inspection by public—Sanadi or quit and ground rent tenure—Estoppel against Government as to—Certified extracts stating tenure to be quit and ground rent—Notice by Collector requiring payment of ground rent—Parties not attaching importance to difference—Effect of—Interpretation of purpose of the Act.

A advanced certain sums of money by way of mortgage on some lands situated in the town of Bombay. His representatives, a firm of surveyors, examined Laughton's Revenue Survey Register and entries in the Collector's Rent Rolls at the Collectorate in both of which reference to grant of Sanad in respect of lands in question in 1824 was mentioned. Certified extracts were obtained: but one of them omitted any mention of the Sanad and wrongly spoke of the title as Rent Roll of quit and ground rent. The notice in which Collector required the payment of quit and ground rent at New Town was also got from the mortgagor. A second advance was made and the solicitor employed inspected the title-deeds and certified extracts and the records at the Collectorates with a mention of Sanad of 1824. In 1908 the Collector for the first time described the lands as Sanadi instead of quit and ground rent land as heretofore. The mortgagee in possession after protest to the Collector instituted the suit for a declaration that the Government was by the conduct of the Collector by reason of the mistakes in the certified extracts and the notice estopped from denying that the land was quit rent tenure:

Held, that the object of the Bombay City Land Revenue Act II of 1876 by which the Collector is required to prepare and keep a separate register and rent roll of various lands, is to ascertain who is liable for the payment of rent and not to provide for registration of title, the provision as to inspection by the public being merely intended to enable them to find out whether they were properly assessed and as such the statements in the registers could not operate as an estoppel against the Government.

Held, further that in order to interpret a section of an Act, the Act must be read as a whole and its purpose ascertained.

Held, also, that a statement as to the nature of the tenure to the difference in which the parties attached no importance could not operate as an estoppel as to it.

Appeal from a judgment and decree of the High Court of Bombay dated March 25, 1912, affirming a judgment and decree of the High Court in its ordinary Original Civil jurisdiction, dated July 15, 1911.

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*29th June, 1915.

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The old quit and ground rent tenure has prevailed in the old town of Bombay outside of, and adjacent to the Fort. In or about the years 1803-1805 the Government decided to remove in large measure the occupiers of those holdings from that locality, and those that were ejected were granted fresh tenure under Sanads in the New Town or Camatipura. The land in question was originally so granted. A rent-roll of all tenures whether (1) pension and tax, (2) quit and ground rent, or (3) Sanads, was kept in the office of the Collector, under the heading "Rent Roll of lands situated at New Town or Camatipura, and this practice continued up to the year 1876, when Bombay Act 2 of 1876 was passed. A new rent-roll was opened under the heading "Rent Roll of quit and ground rent land" and in it were entered tenures held on Sanads as well as the quit and ground rent. No distinction was recognised between these two classes of tenures, and it was generally believed that neither class was likely to be resumed. In 1904 the Government increased its right to resume certain Sanadi land in New Town in Bombay, and succeeded in establishing its right which was contested in the Courts. In 1905-6 Government made a special investigation into the lands held under Sanads and in 1908 opened a new and separate rent-roll for such lands. The Collector altered the form of the rent receipt granted to those who held lands by virtue of Sanads, by describing them as *Sanadi*. The plaintiffs, through their solicitor, addressed to the Collector and objected to this being done, and demanded that their land should continue to be described as quit and ground rent which the Collector declined to do.

The plaintiffs then instituted the present suit against the defendant No. 1, the Secretary of State for India and the defendant No. 2, the plaintiff's mortgagor, to obtain various reliefs by way of declaration and injunction. The substance of the plaintiff's claim briefly was that owing to representations contained in three extracts from the records of the office of the Collector of Bombay, a notice issued by the Collector of Bombay, and bills of the year 1901, the plaintiffs were intentionally caused or permitted to believe that the land in suit was a quit and ground rent tenure, and therefore, that by reason of such representations made by his agent, the Collector of Bombay to the plaintiffs or their mortgagor, or their agents, the said defendant No. 1, the Secretary of State for India, was now estopped from denying that the said

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lands were of the said tenure and from asserting that they were really held under a Sanad of the 3rd of February 1824. Further, the plaintiffs contended that by reason of the defendant No. 1 and his servants having stood by for so long a period and permitted his predecessors-in-title and himself to deal with and traffic in the said lands as of quit and ground rent tenure, the said first defendant was now equitably estopped from asserting that the land was not of that tenure or attempting to resume it as being held under the Sanad. Plaintiffs further contended that they or their predecessors-in-title have acquired a right by prescription against defendant No. 1 to the said land which they were entitled to hold henceforth upon quit and ground rent tenure.

The defendant No. 1 contended that he was not bound by the representations of the Collector of Bombay relied upon by the plaintiffs, even assuming that each and all of those declarations were made, as and when alleged by the plaintiffs, because it was not within the competence of the Collector of Bombay to vary the tenure of lands under his control nor, therefore, could any representations which he might have made intending to have that result, be within his competency and, therefore, binding on the defendant No. 1 by way of estoppel.

The High Court in its Original Civil Jurisdiction, held that the defendant No. 1, the Secretary of State, would be bound and estopped by the representations of the Collector in negligent breach of his statutory duty, which were made with the intention and effect of inducing the plaintiffs to believe that the land which, in fact, was Sanadi was of a quit and ground rent tenure; but on the merits it decided against the plaintiffs who appealed to the High Court. The High Court on its Appellate Side disagreed with the judgment of the original court and held that the Secretary of State would not be bound or estopped by acts or omissions of the Collector, amounting to negligent representation in breach of his statutory duty. In the result the appeal was dismissed. The appellants then appealed to the Judicial Committee in due course.

P. O. Lawrence, K.C., Raikes and Lowndes appeared for the appellants. By Bombay Act II of 1876 S. 39, the Collector was under a duty to prepare and keep a separate register and rent roll of every description of land, according to the nature and terms of the tenure on which such land was held. S. 40 provided that the same would be open to inspection of the public and that certified

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extracts and copies thereof should be given to all persons applying for the same. Extracts were obtained which were legal evidence of the contents of the rent rolls under S. 77 of the Indian Evidence Act 1872. In the extracts, the land was described as of quit and ground rent tenure. The representatives of the mortgagees who wanted to investigate the title of the mortgagor were misled by the entries and the notice which the Collector sent to the latter in respect of the rents due. The appellant deposed that he would not have advanced the amount if he had known that the land in question was Sanadi and the solicitor swore that he would not have advised his client to make the advance had he not been satisfied on inspection of the certified extracts and the receipts and notices in all of which the land was described as of quit and ground-rent tenure; that it was not Sanadi. There was in the rent roll for the year 1878-9 on the page from which the said extract was taken a note in red ink in the following terms: "Vide Sanad, dated February 3,1824 and in another of the public records of the Collectorate referring to the said land, *viz*, the Register of Revenue Survey 1868-9 there had been another pencil note "as per Sanad dated 3rd February, 1824". These appeared to have been interpolated after the extracts were obtained. It was rent until 1908 when there was change in the form of the receipt. The mortgagees were led to believe that the land was not Sanadi and on the strength of that belief they advanced the amount, the Collector acting for the Government had then in his official capacity made representations and therefore the Secretary of State in Council was bound by those representations and estopped from denying that that the land was not of quit and ground-rent tenure.

Sir E. Richards, K. C. and Dunne appeared on behalf of the respondent but were not called on.

The judgment of their Lordships was delivered by

Viscount Haldane.

Viscount Haldane.—The facts in this case are really not in controversy. The appellants have advanced on mortgage of land in the city of Bombay, Rs. 80,000. The claim against the respondent, the Secretary of State, that they advanced this sum to Abdul Hussein Ibrahimji, the mortgagor, relying on statements in certified extracts from the rent roll of quit and ground rent land, kept in the office of the Collector of Bombay, to the effect that the land was of quit and ground rent, and not of Sanadi

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tenure. The question to be decided is whether the appellants, who were plaintiffs in the courts below, are entitled to a declaration that the respondent is estopped from treating the land as of Sanadi tenure. In Bombay both of these tenures exist. The land in question is in fact held under a Sanad which purports to enable the Government to resume possession for public purposes on giving six months' notice and providing compensation for buildings and other improvements. For the purposes of the question to be decided their Lordships assume, although the point is not conceded, that if the land were held on the other tenure it would be contrary to the practice of the Government, if not to the law, to resume possession, and that the land would be in consequence more valuable as a security. It is not, however, clear that such a view has always prevailed or that the difference between the two tenures was regarded as important at the time of the mortgage.

The Sanad was granted by the Government of Bombay in 1824, a rent of 11 reas per square yard being reserved. Such a rent would have been the usual rent had the land been of the other tenure.

In January 1892 the mortgagor had granted a security over the land for an advance from the Chartered Mercantile Bank. A Mr. Gostling, partner in the firm of Gostling and Morris, land surveyors in Bombay, had been employed to report on the security and the title. He inspected certain entries in the Collector's rent-rolls and in what was called Laughton's Revenue Survey Register, both of which were kept in the office of the Collector. In the entries which he inspected there were express references to the Sanad with which the title originated. He applied to the Collector for "certified extracts" from the rolls and register. These extracts were, in accordance with the rules which obtained, made by his own clerk, and were formally certified by an assistant of the Collector as correct. The extracts were, however, inaccurate in certain points. In one of them the title given was "rent roll of quit and ground rent,' instead of, as it should have been in accordance with the book from which it was taken. "Rent roll of land situated in New Town or Camatipura." In another of the extracts, the entry in the rent-roll from which it was taken contained a reference to the Sanad of 1824, and this was omitted in the extract. Mr. Gostling, in addition,

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obtained from the mortgagor a notice in which the Collector required payment of a small sum as rent for "the quit and ground rent land situated "at New Town." He also inspected the title-deeds. These did not go back as far as the Sanad of 1824, but on one of them dated in 1843, there was an indorsement to the effect that the registration of deeds of transfer did not imply any relinquishment of the right of ownership in, or the power to resume, the land at the pleasure of the Government, but that the sole object of the register was to enable the Collector to apply to the proper person for the payment of the rent.

Mr. Gostling does not appear to have been deterred by this indorsement, or by the references to a Sanad from recommending the title. Their Lordships think that in 1892, when he made the investigation, importance was not attached in the same degree as later on to the difference between the two tenures. It appears to have been thought that in neither case was there substantial likelihood of the Government resuming the land.

On the 25th October 1892, some ten months after the first advance, the mortgagor obtained advances on second mortgage from the appellants. The latter employed a solicitor named Shroff, to investigate the title and advise as to the security. His evidence shows that he inspected the title-deeds at the bank and also got hold of the certified copies of the extracts from the Collector's rent-rolls and the Collector's notice to which reference has been made. He appears to have applied to the Collector for access to certain of the records and to have obtained it. At all events he searched the records, which not only did not indicate that the tenure was quit and ground rent, but which contained a reference to the Sanad of 1824. It is probable that he was not paying more attention to the difference between quit rent and Sanadi tenure than had Gostling or the Collector's clerk who checked the extracts made by Gostling's clerk. In the end he advised the appellants to proceed with the mortgage.

The case made for the appellants, who were plaintiffs at the trial, was that by reason of the references and omissions in the copies of the extracts, as well as in the Collector's notice and in certain bills sent in by the Collector for the rent due, the action of the Collector has estopped the respondent, the Secretary of State, from denying that the land is of quit rent as distinguished from Sanadi tenure, and that the appellants are entitled to a declaration

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of title on that footing. In order to determine whether this is so it is necessary to ascertain what was the duty of the Collector and his position in relation to the Government and the public. The Collector, prior to 1876, kept in his office what were called rent rolls of land, on whatever tenure held. After 1876 this practice continued, but was regulated by the Bombay Act No. 2 of that year, known as the Bombay City Land Revenue Act, 1876.

Under this Act, which extends only to the city of Bombay, the controlling authority in all matters connected with the land revenue is vested in the Collector of Bombay, subject to the Governor-in-Council. The duty imposed on him is to fix and levy the assessment for land revenue. The liability is to be settled with the superior holder of the lands, subject to an appeal to the Revenue Judge, who is to be the Senior Magistrate of Police. There is a further appeal to the High Court on its appellate side. The existing survey and the demarcation of lands already made, and all the records of this survey are to be *prima facie* evidence. Corrections of such demarcation or of entries in the records of the survey may be made by the Collector, or by order of a competent court.

Part VIII of the Act relates to transfer of lands. Section 30 provides that whenever the title to immoveable property subject to the payment of land revenue to the Government is transferred, the transferor and transferee are to give notice to the Collector. Any transferor who fails to give notice is, in addition to being liable for a penalty, to continue liable for the payment of land revenue until notice is given or transfer is effected in the Collector's records. In case of dispute as to the making or completion of any entry or transfer, the Collector may summon the parties and take evidence and decide summarily what entry should be made. Section 35 provides that the registration or transfer of any itle in the Collector's records shall not be deemed to operate so as in any way to affect any right, title, or interest of the Government in the property in respect of which such transfer is made or registered. In the final part of the Act, which is headed "Miscellaneous," it is provided that it shall be the duty of the Collector to prepare and keep, in such form as the Government shall from time to time sanction, a separate register and rent roll of every description of land, according to the nature and terms of the tenure on which such land is held. All maps, registers,

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and other records are to be kept in the office, and to be open to the inspection of the public, who are to be entitled to obtain extracts or certified copies.

Their Lordships are of opinion that the Act must be treated as defining the extent of the rights of anyone who consults the maps, register, and records at the office, and that in order to ascertain these rights the Act must be read as a whole and its purpose ascertained. When it is so read their Lordships think that this purpose and the nature of the rights conferred are not doubtful. The Act is one which makes provision for the administration and collection of the land revenue of the Government in the city of Bombay It is for this purpose only that it sets up machinery. The object is to ascertain who is liable to pay. The Collector is a revenue official, and it is only in so far as the collection of revenue is concerned that he is entrusted with the duty of preparing a register and keeping records. The public are given access to these only in order to satisfy themselves that they are being properly assessed. The Act does not purport to establish a system of registration of title, which is to supersede other means of conveying or registering the title to land or to relieve purchasers or mortgagees from the ordinary obligation to see that they get what they have contracted to get. No doubt the register is of considerable use even for conveyancing purposes. But neither the language of the statute nor the character of the officials, who have the duty of keeping it, is such as to indicate an invitation to the public to rely on statements in the records as to title which may have to be made incidentally, but which are not expressed and do not purport to be decisive either of the rights of the Government or of those of the individual as to matters which go beyond liability to contribute to land revenue.

From this conclusion as to the scope of the Act, it follows that what has taken place in the present case has not given the appellants any right to claim that the Government is prejudiced in any right it has to treat the land in question as of quit rent as distinguished from Sanadi tenure. Nor are their Lordships satisfied that at the time of the investigation of the title in 1892 the parties themselves really attached much importance to the statements as to tenure in the extracts and other documents produced. They appear to have inspected the deeds in the usual fashion, and to have concerned themselves with the question of who was the

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owner of the land rather than with the question of the rights of the Government. In the view which has been taken, it is not necessary to deal separately with the question raised under S. 35 of the Act as to whether any right, title, or interest of the Government could be affected by the registered entry.

Their Lordships will humbly advise His Majesty that the appeal fails and ought to be dismissed with costs.

Solicitors for appellants: *E. F. Turner and Son.*

Solicitor for respondent: *India Office.*

PRIVY COUNCIL.

Present:—Lord Atkinson, Sir George Farwell, Sir John Edge and Mr. Ameer Ali.

[On Appeal from the Chief Court at Lahore.]

Padman and others ... ... *Appellants* *

v.

Hanwanta and others ... ... *Respondents.*

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Padman v. Hanwanta

Will—Non-production of Will—Presumption of revocation—Secondary evidence—Not properly admitted in lower court—Objection taken for the first time in appellate court—Withdrawal from proceedings to set aside arbitrator's award—Some of the legatees disclaiming benefit of new will—Other legatees not entitled to their shares.

In view of the habits and conditions of the people of India, the rule of English law, *viz.*, that when a will is traced to the possession of the deceased and is not forthcoming at his death, the presumption is that he has destroyed it, must be applied with considerable caution.

In a case where the testator was a very old man at the time of his death and was almost imbecile and there was nothing definite to show that he had any motive to destroy the will, or was mentally competent to do so, on the other hand the circumstances were in favour of the view that the will was mislaid or stolen. *Held*, that it was within the competence of the lower court to come to the conclusion that the will was not revoked.

Where the registration copy of a will was admitted in evidence without objection in the first court. *Held*, that objection to its admissibility on the ground that no sufficient foundation was laid for secondary evidence could not be entertained in appeal for the first time.

Held, further, that the withdrawal of a revision petition filed by one of the co-sharers did not preclude him from claiming his full share when the arbitration proceedings sought to be set aside by him were, as a matter of fact, set aside on the revision petition of the other sharers.

Where a testator divided his estate equally among his eight sons but subsequently revoked the will disinheriting two of them, but some of the legatees chose to abide by the terms of the earlier will.

Held, that the plaintiffs who were the other legatees were not entitled to recovery their shares also.

* 18th May, 1915

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Appeal from a judgment and decree of the Chief Court of the Punjab, dated July 17, 1909, reversing a judgment and decree of the Divisional Judge of Ferozepore, dated December 6, 1907, affirming a judgment and decree of the Court of the District Judge of Ferozepore, dated July 22, 1907.

The facts of the case are sufficiently set forth in their Lordship's judgment.

De Gruyther, K.C., with him *Parikh* for the appellants contended that it was not proved that Daula at the time he made the will in question was of sound disposing mind. The parties were governed by the Punjab Customary Law. The property being jointly acquired, Daula could not dispose of it to the exclusion of two of his sons who had helped in the acquisition thereof. There was no proof that the will was lost and therefore secondary evidence thereof was inadmissible. It was proved that Daula had cancelled the will by his subsequent acts. The will was in the custody of Daula himself and as on his death it was not found, the presumption was that he destroyed it. It was not rebutted; on the contrary there was evidence in support of it. In any case the respondents could recover only their own share of the property in suit. Withdrawal from the proceedings to set aside the award of the arbitration could not deprive those who were rightly entitled to a certain share, of their shares It was settled law that guardian on behalf of a minor could not compromise without the leave of the Court. The object of the Civil Procedure Code was to secure the finality of an award. Under Ss. 522, the decree passed on an award is not appealable. Error in law did not vitiate the award. Application in revision under Ss. 622 was subject to the Limitation Act, Sch. II, Art. 158 and S. 12.

Reference was made to *Welsh* v. *Philips* [1], *Manohar Lal* v. *Jodu Nath Singh* [2] *Ganesh Row* v. *Tulja Row* [3], *Ghulam Jilani* v. *Mohamed Hossain* [4].

Arthur Grey for the respondents contended that sufficient evidence had been given of the existence of the will of 1898 at the time of the death of the testator and the contract thereof were rightly proved by secondary evidence. The will was not destroyed with the intention of revoking it. The findings were of facts in which the Divisional Judge and the Chief Court had concurred

1. (1836) 1 M. P. C. 299.
2. (1906) L. R. 33 I. A. 128.
3. (1913) L. R. 40 I. A. 139.
4. (1901) L. R. 29 I. A. 51.

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and could not be disturbed. The property was self-acquired and therefore Daula had power to dispose of it as he chose. The Chief Court was right in refusing to review their decree with regard to the shares of Ram Sukh, and still more with regard to the shares of Bhinja and Shera.

[*Lord Atkinson* :—You sued for the undivided whole.]

He was entitled to sue for a declaration and be trustee for others. Such suits was frequently brought and proper decree made without prejudice to the rights of others.

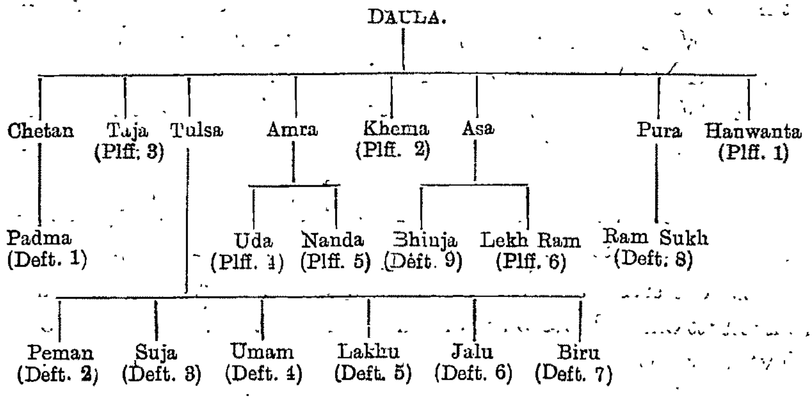
In appeal it was open to parties to raise any point but not on revision. Nobody had a right to be heard. Proceedings were by petition (Sec. 115 of C. P. Code of 1908) and Punjab Courts Acts. Act 18 of 1884, Sec. 70, which applied 622 of C.P.C. of 1882 without the word illegal. If there was material irregularity, the High Court called for the record. The High Court had power of its own motion to send for the record but in practice it was on petition by anyone.

De Gruyther in reply.

The judgment of their Lordships was delivered by

Mr. Ameer Ali.—This is an appeal from a judgment and decree of the Chief Court of the Punjab, dated the 17th of July 1909, and the dispute relates to the property of one Daula, a Jat by origin, who migrated from Bikanir many years ago and settled in the Ferozepore district. He died in April 1902, leaving a large family of sons and grandsons and considerable landed property.

The following pedigree will explain the relative position of the contesting parties in the present litigation :—



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In 1884 Daula had executed a will, which was duly registered at the time, under which his surviving sons and a grandson Ram Sukh, whose father Pura had died, were to take his properties substantially in equal shares.

In January 1898 he revoked his former will and made another, which also was registered by which, excluding Chetan and Tulsa, he left his property in six equal shares to his four other surviving sons and to Ram Sukh, the son of Pura and to Bhinja and Lekh Ram, the two sons of Asa, who had died in the meantime.

On Daula's death there were the usual mutation proceedings for the registration of the names of his successors in the Collecter's Register, in the course of which the devisees under the second will claimed to have their names recorded to the exclusion of Chetan's and Tulsa's representatives. In view, however, of the provisions of the will of 1884, the Collector ordered the names to be entered in eight shares and referred the contending parties to settle their respective claims in the Civil Court. This happened in September 1902, and in December following the present suit was brought by the persons taking under the second will against the representatives of Chetan and Tulsa, defendants 1 to 7, to establish the plaintiffs' claim under the will of 1898 and to recover possession of the one-fourth share of Daula's lands in respect of which Chetan and Tulsa had been recorded as owners. This one-fourth includes the shares of Ram Sukh and Bhinja, who, on their refusal to join in the action, had been made defendants (8 and 9).

The defendants 1 to 7 raised various objections to the plaintiffs' suit, the nature of which is indicated by the issues framed by the Court of First Instance. They are as follows:—

(1) Whether the property in dispute was acquired by Daula alone or jointly by him and his sons.

(2) Whether the will of 1898 was executed by Daula voluntarily and whether he was competent to make such a will.

(3) If so, whether the will has been cancelled by any subsequent act on his or on the part of the plaintiffs.

Before trial, however, the parties agreed to refer the dispute to arbitration. The arbitrators made an award, and on the 25th November 1903 the District Judge, in accordance therewith,

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dismissed the plaintiffs' claim. On revision under S. 622 of the Civil Procedure Code of 1882, the Chief Court reversed the order of dismissal and remanded the case to be disposed of according to law. On remand the first court went into evidence and in the result dismissed the plaintiffs' claim, principally on the ground that the lands in dispute were not the self-acquired properties of Daula over which he had a right of disposition *de hors* the ordinary law under which ancestral property is inheritable by sons and grandsons *per stirpes* in equal shares. The District Judge does not say this in so many words, but this is clearly the effect of his judgment. On the other issues he does not appear to have come to definite findings.

On appeal by the plaintiffs the Divisional Judge was of opinion that the properties to which the suit related were the self-acquired properties of Daula within the Hindu Law, and that the will of 1898 was not open to the objection of having been executed under undue influence or without due comprehension; but he considered that the subsequent acts of Daula showed that he had revoked or cancelled it. He was further of opinion that no sufficient foundation was laid for the admission in the first court of secondary evidence of the will of 1898. He accordingly dismissed the plaintiffs' appeal.

From his judgment the plaintiffs appealed to the Chief Court, which agreed with the Divisional Judge in his finding that the properties in dispute were the acquisitions of Daula who had a right of disposition over them. The learned Judges were also of opinion in agreement with the second court on the question of the competency of Daula to make the will of 1898, but they differed from the Divisional Judge on the point on which he had dismissed the plaintiffs' suit. They held in substance that there was no sufficient evidence of revocation. They accordingly set aside the Divisional Judge's judgment and gave the plaintiffs a decree for the entire one-fourth share claimed by them.

An application for review of judgment was made to the Chief Court under the provisions of S. 623 of the Civil Procedure Code, for the exclusion of the shares of Ram Sukh and Bhinja from the decree in favour of the plaintiffs. It was also attempted to be argued on this application, on certain grounds to which their Lordships will refer presently, that the share of Shera, one of the sons of Khema who had died after the institution of the

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suit, should be excluded. These applications were rejected by the Chief Court.

The defendants have now appealed to His Majesty in Council, and the case has been argued on their behalf in great detail. It was urged in the course of the argument that a registered copy of the will of 1898 was admitted in evidence without sufficient foundation being laid for its admission. No objection, however, appears to have been taken in the first court against the copy obtained from the Registrar's office being put in evidence. Had such objection been made at the time, the District Judge, who tried the case in the first instance, would probably have seen that the deficiency was supplied. Their Lordships think that there is no substance in the present contention.

As regards the question of revocation, the Chief Court, after reviewing all the circumstances said as follows: "We think "that the more reasonable presumption in this case is that the "will was mislaid and lost, or else was stolen by one of the "defendants after the death of Daula"; and they held that in their opinion it was not revoked. Their Lordships think that it was perfectly within the competency of the learned Judges to come to that finding. Much stress has been laid on the view expressed by Baron Parke, in *Welch* v. *Phillips* [1] that when a will is traced to the possession of the deceased and is not forthcoming at his death the presumption is that he has destroyed it. In view of the habits and conditions of the people of India this rule of law, if it can be so-called, must be applied with considerable caution. In the present case the deceased was a very old man and, towards the end of his life, almost imbecile. There is nothing definite to show that he had any motive to destroy the will or was mentally competent to do so. On the other hand the circumstances favour the view the Chief Court has taken that the will was either mislaid or stolen.

As regards the contention that the shares of Shera, Ram Sukh, and Bhinja should be excluded from the decree in favour of the plaintiffs, their Lordships will first deal with Shera's share. It is urged that inasmuch as Shera had put in a petition in the Chief Court to withdraw his application for revision in the arbitration matter which was formally granted on the 3rd April 1906, he must be taken as estopped from questioning the defendants'

1. 1 Moore, P. C. 299.

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right so far as his particular share is concerned. In other words, that he must lose his share, if he is otherwise entitled to it, by the simple fact of having withdrawn or tried to withdraw his application for revision. Their Lordships think this contention is clearly not well founded. On the same day on which the order was made on Shera's petition, *viz.*, the 3rd of April, the Chief Court set aside *in toto* "the reference to arbitration and subsequent proceedings as altogether bad." The parties were thus relegated to their original rights; Shera is now a plaintiff, and entitled, like the others, to his share.

The effect of the order in the mutation proceedings was to place the representatives of Chetan and Tulsa in possession of two-eighths or one-fourth share of the property, and the suit is to recover from them this share; but Ram Sukh and Bhinja, who are entitled, under the will of 1898, to one-sixth and one-twelfth respectively under the second will disclaim all benefit thereunder. They are apparently in possession under the Revenue Court's order of one-eighth and one-sixteenth respectively. The one-fourth share claimed by the plaintiffs for which the Chief Court has made a decree in their favour, includes the excess share of Ram Sukh and Bhinja, which amounts to one-twenty-fourth and one-forty-eighth respectively, in the aggregate one-sixteenth. The plaintiffs are clearly not entitled to a decree for their shares. The decree of the Chief Court must, therefore, be modified to that extent. In other words the decree will be for three-sixteenths instead of one-fourth. And their Lordships will humbly advise His Majesty accordingly.

Having regard to the general result of the appeal, their Lordships think the ends of justice will be met by ordering each party to bear their own costs.

Solicitors for appellants: *Edward Dalgado.*

Solicitors for respondents: *T. L. Wilson & Co.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Spencer and Mr. Justice Kumaraswami Sastri.

Krishnacharya ... *Appellant (Plaintiff)*

v.

Anthakki and others ... *Respondents (Defendants.)*

Krishnacharya v. Anthakki.

Landlord and tenant—Mulgeni Lease—Trees, Right of tenant to cut and appropriate—Extent of the right.

In the absence of a prohibition in the lease, a Mulgeni tenant is entitled to cut and appropriate the trees on the holding, whether planted by him or of spontaneous growth, so long as the trees growing on the land at the date of the lease are not interfered with, and the nature of the holding is not changed.

Gangamma v. *Bhommakka* [1], *Vasudevan Nambudripad* v. *Valia Chathu Achan* [2], Referred to.

Second Appeal from the decree of the District Court of South Canara in A. S. No. 131 of 1912, preferred against the decree of the Court of the District Munsif of Mangalore, in O. S. No. 363 of 1910.

K. Ramanath Shenoi for Appellant.

B. Sitarama Rao for Respondent.

The Court delivered the following

Judgment:—This suit was brought to restrain a mulgeni tenant from cutting down the trees in his holding. These include three classes of trees, *viz.*, (1) trees in existence at the grant of the lease, (2) trees planted by the tenant, and (3) trees of spontaneous growth. In the District Munsif's Court the plaintiff's pleader conceded that he had no title to the trees planted by the lessee after the commencement of the lease. In this Court even this position is contested, but if we rely upon the analogy of the Transfer of Property Act, as it was held in *Gangamma* v. *Bommakka* [1] that Courts were entitled to do, S. 108, cl. (h) is against the appellant's contention and no direct authority has been cited for a different view.

The decision in *Gangamma* v *Bhommakka* [1] is conclusive on the point that a mulgeni lessee in South Canara is not entitled to cut trees standing at the date of the grant. The plaintiff failed

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* S. A. No. 2355 of 1913. 10th August, 1915.

1. (1909) I L R. 33 M. 253. 2. (1898) I. L. R. 24 M. 47 (F. B.)

Krishnacharya v. Aitthaki

to prove that the defendant has sold or felled any of such trees. Therefore an injunction was properly refused.

There remains the case of trees and plants of spontaneous growth. In other parts of the Presidency, by S. 12 of the Madras Estates Land Act, the legislature has, as regards ryots possessing occupancy rights in land situated in estates, put trees planted by the ryot and those that grow naturally upon the holding on the same footing, and has recognised the ryot's right to enjoy and cut them. In Malabar under the Malabar Compensation for Improvements Act, compensation is allowed to the tenants at the rate of ¾ths of the market value for trees spontaneously grown during the tenancy, and the cost of protecting and maintaining such trees grown prior to the commencement of the tenancy is to be paid to the tenants. In *Vasudevan Nambudripad* v. *Valia Chathu Achan* [1] the right of kanomdars was recognised to remove trees which they have planted during the period of their occupation. This decision does not decide the right even of kanomdars in Malabar to remove trees of spontaneous growth, but it is worthy of notice that when an argument was advanced that trees exhaust the ground and that this was a reason for the landord being more interested in their growth than the tenant, this suggestion did not meet with the approval of the Full Bench. The only obligation on the part of the tenant that they recognised was that he should restore the land at the end of his lease period in as good a condition as he received it at the beginning. The observation in *Ruttonji Edulji Shet* v. *The Collector of Tanna* [2], that the trees upon the land were part of the lands and the right to cut down and sell them was incidental to the proprietorship of the land, had reference to trees standing in the land when the lease was made. Mr. Ramanatha Shenai for the appellant, has not been able to advance any sound reasons for vesting in the mulgar the entire right to trees that have sprung up without any effort or expenditure on his part. Nor has the appellant adduced any evidence of custom or usage by which he is entitled to such growth. The lease is silent on the point. We consider that if landlords were to have the power to prevent their tenants from clearing the ground of shrubs and undergrowth, this would greatly interfere with the tenant's use of the land for agriculture. Even in England, the property in bushes is in the

1. (1898) I. L. R. 24 M. 47, (F. B.) 2. (1867) 11 M. I. A. 295.

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tenant vide *Berriman* v. *Peacock* [1]. In this country it may well be that on leasing land capable of growing timber, the lessee may intend to raise and cut timber for sale as fire wood, etc., and so long as the trees growing on the land at the date of the lease are not interferred with and the nature of the holding is not changed, it is difficult to see why the tenant should not be entitled to any benefit conferred on him by nature. We therefore dismiss this Second Appeal with costs.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Sadasiva Aiyar and Mr. Justice Napier.

Annamalai Mayammad Meera Rowthan's Son Abdulla Rowthan. ... *Appellant* (1st Defendant)*

v.

The Honourable Rajah Vasudeva Ravi Varma styled Valia Nambidi of Vengunnat and others. ... *Respondents (Plaintiffs and Defendants No. 2 to 15.)*

Abdulla Rowthan v. Rajah Vasudeva Ravi Varma.

Malabar Compensation for Tenants Improvement Act, Ss 9 to 19 (Madras Act I of 1900)—Kanom before 1886—Contract disallowing compensation for clearing jungle and converting into—Paramba—Provision for rates—option to tenant to claim rates under the Act, if more favourable—Partial redemption is permissible when there has been a splitting up of the mortgage with the consent of both the parties.

Where a kanom document executed before 1886, provided that the mortgagor need not pay the cost of clearing the jungle lands and converting them into parambas.

Held, following *Kocku Rabia* v. *Abdur Rahman* [2] that the contract was not saved by S. 19 of the Malabar Tenant's Improvement Act and the tenant was entitled to compensation.

Held, also, that the tenant was not prevented from claiming compensation according to the Act if the terms of the mortgage agreement were less favorable to him even though the mortgage agreement was executed before 1886.

Second appeal from the decree of the Court of the Temporary Subordinate Judge of Palghat, in A. S. Nos. 913 and 1914 of 1911. dated 21st September 1912, preferred against the decree of the Court of the District Munsif of Alatur in O. S. No. 325 of 1910.

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* S. A. 164 of 1913. 19th March, 1915.

1. 9 Baig. 384.
2. (1913) 26 M. L. J. 523.

Abdula Rowthan v. Rajah Vasudeva Ravi Varma.

T. R. Ramachendra Aiyar for Appellant.
C. V. Ananthakrishna Aiyar for Respondents.

The Court delivered the following

Judgment:—The 1st defendant is the appellant. The suit was for redemption of a kanom for taking the accounts as between the mortgagor and the mortgagee including the value of improvements due to the mortgagee and for the usual other reliefs.

The lower Appellate Court has decreed redemption and has given certain directions as to how the value of the improvements is to be calculated. The questions raised by the first defendant in this second appeal are:

(i) whether the plaintiff could redeem that portion of the lands demised on the kanom of 1850 which portion is in the possession of the 1st defendant, on payment of the proportionate kanom amount and of the value of the improvements made on that portion by the 1st defendant;

(ii) whether the 1st defendant is entitled to the value of the cost of the conversion of the jungle lands into paramba lands; and

(iii) whether the rate of compensation to be allowed per para of seed sowing lands is to be Rs. 7 per para as agreed upon between the mortgagor and the mortgagee under the document, Exhibit A of 1850, or whether the value should be calculated in accordance with the provisions of Ss. 9 to 18 of the Madras Act I of 1900 called the " Malabar Compensation for Tenants' Improvements Act".

As regards the first question there is the distinct finding of the lower Appellate Court that the original mortgage of 1850 had been split up with the consent of both the parties and it is also stated in the Lower Court's judgment that the objection was given up by the 1st defendant, the District Munsif's Court and was not argued in the Lower appellate Court.

Coming to the 2nd and 3rd questions, the lower Appellate Court construed the Full Bench decision in *Randupurayil Kunhisore* v. *Neroth Kunhi Kunnon* [1] as deciding that in the case of contracts made prior to the 1st January 1886, the right to claim compensation depends upon the terms of the contract and the rate of compensation is also governed by the terms of the contract and not by the provisions of the Malabar Compensation for Tenant's Improvements Act. As one of the terms of the

1. (1908) I. L. R. 32 M. 1

Abdulla Rowthan v. Rajah Vasudeva Ravi Varma.

kanom, Exhibit A, as that the mortgagor need not pay the cost of clearing the jungle lands and converting them into parambas, the lower Appellate Court disallowed that costs.

The decision in *Randupurayil Kunhisore* v. *Neroth Kunhi Kannon* [1] has, however, been interpreted by the later Full Bench decision in S. A. No. 1414 of 1912 (See *Kochu Rabia* v. *Abdurahman* [2]) as not inconsistent with the decision in *Kozhikoi Sreemanavikraman* v. *Madathil Ananda Pattar* [3], and in *Paru Amma* v. *Kunhi Kandan*. In the case *Paru Amma* v. *Kunhi Kandan* [4], it was held that where the kanomdar was not restrained by a contract made prior to January 1886 from making improvements, but was only restrained from claiming a right to compensation for such improvements, the kanomdar is entitled to claim compensation under the Act notwithstanding the provision in the agreement. We are bound to follow the later Full Bench ruling and we hold that notwithstanding the terms of Exhibit A, the 1st defendant is entitled to claim compensation for conversion of jungle lands into parambas.

As regards the 3rd question, the same Full Bench ruling reported in *Kochu Rabia* v. *Abdurahman* [2], has held that the earlier Full Bench decision in *Randupurayil Kunhisore* v. *Neroth Kunhi Kunnan* [1], should not be construed as negativing the tenants' right to claim compensation for improvements according to the Act if the terms of the mortgage agreement are less favourable to him as regards such right even though the mortgage agreement was executed before 1886. Mr C. V. Ananthakrishna Aiyar, the plaintiff's learned vakil, argued that the opinion of the Full Bench on this point in *Kochu Rabia* v. *Abdurahman* [2], as to the construction of the judgment in *Randupurayil Kunhisore* v. *Neroth Kunhi Kannan* [1], was erroneous. We naturally refused to listen to this arguement.

In the result, we request the Subordinate Judge to submit findings as to the compensation due to the 1st defendant for the conversion of jungle lands into parambas and for the conversion of lands into rice-producing fields in accordance with the provisions of the Malabar Tenants' Improvements Act.

1. (1908) I. L. R. 32 M. 1, s.c. 18 M L.J. 98. 2. (1913) 26 M. L. J. 523.
3. (1910) I. L. R. 34 M. 61, s.c. 20 M. L. J. 819.
4. (1911) I. L. R. 36 M. 410, s.c. 23 M. L. J. 221.

Time, 3 months from receipt of records and ten days for filing memorandum of objections.

[In compliance with the orders contained in the above judgment the Temporary Subordinate Judge of Palghat at Calicut returned a finding that the 1st defendant was entitled to Rs. 4,811 and odd on both the heads and the Second Appeal came on for hearing after the return of the finding the Court delivered the following.]

Judgment:—We accept the finding. We modify the decree of the lower Appellate Court by allowing to the 1st defendant Rs. 4,811-9-3 for improvements (on account of reclamation) in substitution of the amount of Rs. 1,983-1-7 awarded by the decree of that Court.

The plaintiff-respondent will pay the appellant's 1st defendant's costs in this second appeal.

Time for redemption will be extended to six months from to da te.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Spencer and Mr. Justice Napier.

Thuvoor Venkata Subba Reddi ... *Appellant* * *(Plaintiff).*

v.

Bagiammal ... *Respondent* *(Defendant).*

Mortgage—Joint Mortgagors—Separate properties of two persons—Security for joint debt—Payment by one of a portion of the debt and release of his property—Right of mortgagee to proceed against the property of the co-mortgagor—T. P. Act, Ss. 67 *and* 82.

As between the original parties the release by a mortgagee of the property of one of the mortgagors from the mortgage security does not affect his lien upon the residue for the whole debt and it is not open to the other to claim a proportionate reduction on the ground of such release

Per Spencer, J.—The person so released is not a necessary party to the action as against the other properties.

Napier, J.—Courts should be very slow in introducing equities based on equitable doctrines applied to English mortgages into the statutory mortgage law of this country.

Mir Eusuff Ali Haji v. *Panchanam Chatterjee* 1, followed.

Krishna Iyer v. *Muthukumarasami* 2, distinguished.

Second Appeal from the decree of the District Court of North Arcot in A. S. No. 414 of 1911 preferred against the decree of the Court of the District Munsif of Sholinghur in O. S. No. 547 of 1910.

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* S. A. No. 2404 of 1912. 12th January, 1915.

1. (1910) 11 C. L. J. 639, 647. 2. (1905) I. L. R. 29 M. 217.

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L. A. Govindaraghava Iyer and A. Ramachandra Iyer for appellant.

T. G. Raghavachariar for V. V. Srinivasa Iyengar for the the respondent

The Court delivered the following

Judgments:—*Spencer, J.*—In this case the separate properties of two owners were mortgaged to secure a single debt of Rs. 1,800. One of the mortgagors, Arunachella Mudali, paid up Rs.1,631-14-0 and the mortgagee sought in this suit to recover the whole of the balance from the mortgaged properties in the possession of the other mortgagor. The Lower Courts refused to allow the plaintiff to recover more than what the property he proceeded against was rateably liable for.

The questions for our decision are (i) whether there was in law an extinguishment of the mortgagee's lien over Arunachella Mudali's property so as to preclude the plaintiff from recovering the whole of the balance due under the mortgage in this suit and the defendant from obtaining a contribution from Arunachella Mudali in a separate suit in proportion to the value his property bears to the whole debt secured by the mortgage after deducting the amount already paid to the mortgagee; (ii) whether assuming that it was understood by the parties that plaintiff released his right to proceed against Arunachella Mudali's property, this will prevent him from recovering the whole debt from the defendant. The statement in para. 6 of the plaint that Arunachella Mudali cleared off a portion of the interest and principal due upon the mortgage, and that accordingly his properties had been *excluded from the suit* as arranged does not in my opinion amount to an extinguishment of the mortgage lien over Arunachella Mudali's property.

No doubt there are words in Exhibit B showing that plaintiff at one time had an idea of relinquishing his lien over Arunachella Mudali's property, but as it was not a completed transaction and the document contains an admittedly false recital as to the payment of Rs. 1,621 in cash, it cannot affect the equities existing between the parties. Exhibit B therefore does not help defendant as containing an admission of plaintiff that he had given up Arunachella Mudali's property. I consider the alleged extinguishment not proved, but as this is partly a question of fact upon

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which one of the Lower Courts has pronounced in defendant's favour, I proceed to the second question.

Now, as stated in *Mir Esuff Ali Haji* v. *Panchanan Chatterjee* [1]. "It is a firmly settled doctrine that, as between the original parties the release of a part of the premises does not affect the lien of the mortgagee upon the residue, which is bound for the whole debt." There are no words in S. 67 of the Transfer of Property Act to limit the mortgagee's right in this respect. S. 82 declares "where several properties, whether of one or several owners, are mortgaged to secure one debt, such properties are, in the absence of a contract to the contrary, liable to contribute rateably to the debt secured by the mortgage after deducting from the value of each property the amount of any other incumbrance to which it is subject at the date of the mortgage." The effect of this and other sections relating to mortgages has been fully considered in *Krishna Iyer* v. *Muthukumaraswami Pillai* [2], where it was held that there was nothing in the provisions of the Transfer of Property Act to support the view that as between a mortgagee and the holders of the equity of redemption the mortgagee is bound to distribute his debt rateably upon the mortgaged properties. Reliance is placed by respondent's vakil upon the *obiter dictum* at page 224. "It remains only to observe that, if the action of the mortgagee had the effect of extinguishing the mortgage lien upon any portion of the mortgaged property so as to relieve it from the liability to bear its proportion of the debt, he cannot recover more than what the property he proceeds against would be reteably liable for." The learned Judges were here dealing with an argument advanced on behalf of subsequent purchasers. The decision in *Ponnusami Mudaliar* v. *Srinivasa Naicken* [3], is also one relating to the rights of assignees of the equity of redemption. As observed by the Calcutta High Court in *Mir Esuff Ali Haji* v. *Panchanan Chatterjee* [1], the principle "has no application as between the mortgagor and the mortgagee when the rights of no other persons intervene and require protection". The decision in *Sanwal Singh* v. *Ganeshi Lal* [4] is to the same effect. I express no opinion as to the rights of subsequent transferees with or without notice.

It was not necessary to join Arunachallam Mudali as a party to this suit and there has been no application to have him made a

1. (1910) 11 C.L.J. 639.
2. (1905) I. L. R. 29 M. 217.
3. (1908) I. L. R. 31 M. 333.
4. (1913) I. L. R. 35 A. 441.

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party. He is not a person interested in the property which is the subject of this suit. Vide *Krishna Aiyar* v. *Muthukumarasami Pillai* [1] and *Ponnusami Mudaliar* v. *Srinivasa Naicken* [2].

I consider for these reasons that the appeal should be allowed and that the appellant should be given a decree for sale of the plaint mentioned properties for the whole of the balance due upon this mortgage with interest up to the date fixed for payment and that he should recover his costs from respondent throughout.

Time six months from this date.

Napier, J.

Napier, J. —Two questions are raised in this appeal. First whether the plaintiff has in fact extinguished the liability on the property of Arunachellam Mudali under his mortgage; and secondly, whether if he has in fact done so, he is only entitled to recover a rateable proportion of the mortgage amount from the mortgaged properties in the possession of the defendant. The original liability arose on a simple mortgage executed on the 9th March 1898 by Arunachellam Mudali and Sanjeeva Mudali, the father-in-law of the defendant, the mortgage amount being Rs. 1,800 with interest at 12 annas per cent. per mensem. Both executants mortgaged distinct items of property, belonging to each of them, to cover the joint debt and it is admitted that Arunachellam Mudali, one of the original mortgagors, paid a sum of Rs. 1,631-14-0 in August 1910 which amount represented half the then existing liability The plaintiff then brought a suit to recover the balance against the defendant and not making the co-mortgagor a party defendant, alleging that in consequence of his having paid a sum of Rs. 1,631-14-0 to the plaintiff, he and his property out of the hypotheca were excluded from the suit as was arranged with him. The defendant set up in paragraph 10 of the written statement that she was not liable for this balance of Rs. 1,600 as the plaintiff was bound to apportion the mortgage amount rateably on the value of all the mortgaged properties and as Arunachellam Mudali's properties were worth Rs. 5,550 and her property only Rs. 1,020, she was only liable for an amount of Rs. 450 as her share. The issue framed on this plea is: "Whether the plaint properties are liable to be sold only for a rateable amount due as the plaintiff has exonerated the other mortgagor and his properties". The District Munsif held in favour of the defendant on this issue.

1. (1905) I. L. R. 29 M. 217. 2. (1908) I. L. R. 31 M. 333.

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On appeal to the District Court two points were taken, first, that the lower Court had erred in holding that the non-inclusion of Arunachellam Mudali, the co-mortgagor and his properties operated as an extinguishment of the mortgage to that extent, and secondly, that the plaintiff was entitled to recover his debt on any portion of the mortgaged properties. Before the District Court the first point seems hardly to have been pressed; for, the learned Judge states that the only question argued in this appeal related to the second point, it having been assumed that the plaintiff had exonerated the other mortgagor and his properties.

A long and careful argument has been addressed to us by Mr. Govindaraghava Aiyar urging that the plaintiff did not intend, by the language used in his plaint, to allege that he had exonerated the other mortgagor and his properties. I am unable to accept this contention. It is clear to me from the language of the plaint that the parties went to trial on this footing and, seeing that there can be an oral release, I accept the finding of both courts that there had been such a release and that the endorsement on Exhibit A of the payment is evidence of that release.

Assuming, therefore, that the plaintiff had discharged one of the mortgagors from liability under the mortgage by receipt of half the amount due, the question remains whether he is thereby debarred from seeking to recover more than a rateable proportion of the balance from the co-mortgagor. Both courts have held that he is so debarred relying on the language of *Krishna Aiyar* v. *Muthukumaraswami Pillai* [1], and also on the dictum of Mookerjee, J. in *Mir Esuff Ali Haji* v. *Panchanan Chatterjee* [2]. The language used by the learned Judges on page 224 is as follows:—"It remains only to observe, &c." It is to be noted that in the view of the learned Judges the limitation of the mortgagee's rights arises where his action has had the effect of relieving the discharged property from its liability to bear its proportion of the debt and the argument addressed to us is based on the assumption that S. 82 of the Transfer of Property Act which creates the right to contribution does not apply where one of the mortgaged properties has, at the time of the suit, been discharged from liability. The words are "where several properties are mortgaged to secure one debt, such properties are liable to contribute rateably to the debt". It is argued that the words "are mort-

1. (1905) I.L.R. 29 M. 217 at 224. 2. (1910) 11 C. L. J. 639 at 648.

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gaged" mean "are, at the date of suit, liable on an existing mortgage" and that they cannot be read as meaning " where several properties have been mortgaged to secure one debt the right to contribution arises" and that, therefore, the mortgagee having put it out of the power of one mortgagor to get contribution, an equity arises in favour of the remaining mortgagor which limits the mortgagee's right to rateable contribution. It is, to my mind, a little difficult to see how a mortgage can be extinguished so as to prevent contribution but be kept alive for the purpose of ascertaining rateable proportion. But I do not think it necessary to decide here whether the right of contribution has, in fact, been lost, that question may arise in another suit. I am unable however to accept the view that even if it is lost this right of equitable limitation exists. It seems to me that we should be very slow in introducing equities into a statutory mortgage law of this country, based on equitable doctrines applied to English mortgages. The right of contribution is itself an equity, and an equity specifically introduced by statute. If under the English Law of mortgages there is an equitable limitation to the mortgagee's right, it was perfectly open to the framers of the Act to introduce that equity by suitable provision. They have not chosen to do so and in my humble opinion, it is not the function of the Courts to do so for them The learned Judges in *Krishna Aiyar* v. *Muthukumarasami Pillai* [1], examine the provisions of the Transfer of Property Act with great minuteness. They point out that there are only four or five sections which need be considered, namely, Ss. 56, 81, 82, 95 and 60 and conclude as follows :—"It is scarcely necessary to say that there is nothing in any of these sections suggesting the view that as between a mortgagee in the position of the plaintiff and holders of the equity of redemption such as the appellants are, the law compels the former to distribute his debt upon the mortgaged property rateably so as to entitle the latter to insist upon their interest not being proceeded with until after the nephew's one-third share has been proceeded with." S. 81 deals with marshalling; S. 82 is the contribution section; S. 95 creates a charge by a co-mortgagor who has redeemed the whole debt on the share of the other co-mortgagors in the property for their due proportion; S. 60 states the rights of a mortgagor to redeem; S. 56 gives a right to a

1. (1905) I. L. R. 29 M. 217.

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purchaser of one of two properties, subject to a common charge as against the seller, to have the charge satisfied out of the other property as far as such property will extend. It is to be noted that Ss. 56, 81, 82 and 95 are statutory equities in favour of persons owning properties liable to a charge against other persons and other properties equally liable on that charge. It has not been argued, and it cannot be argued, that any of these provisions raises the equity sought for here. The first difficulty in the way of this equity seems to me to be this: If the equity can be used as a defence to a mortgage suit, it obviously should be available to a mortgagor in a redemption suit, for, it is illogical to say that the mortgagee cannot claim more than a rateable proportion, but that the mortgagor in a suit to redeem would have to pay the whole amount. Therefore the right must be exercisable in redemption. Unfortunately, however, the Transfer of Property Act is definite in negativing this right. S. 60 gives a right to the mortgagor to redeem *on payment of the mortgage money* and specifically provides that nothing in the section shall entitle a person interested in a share only of the mortgaged property to redeem his own share only on payment of the proportionate amount of the money remaining due on the mortgage, except where a mortgagee has acquired another such share. Here is to be found the only statutory limitation to the liability of the mortgagor to pay the whole amount due on the mortgage if he seeks to redeem. S. 67 states the rights of the mortgagee. It gives a right to foreclosure or an order for sale to the mortgagee as long as the mortgage money has not been paid. Among all the following sections from 69 to 84 there is not a single provision limiting the right of the mortgagee to recover the amount of his mortgage from any property made liable thereto by the mortgage document, except where he has lost his priority by fraud, misrepresentation or gross neglect, and except as to the right of a second mortgagee without notice of a former mortgage to have the securities marshalled so as to protect himself as far as possible. It is clear, therefore, that this equitable limitation of the mortgagee's right is one which is directly opposed to the language of the various sections, introduces a right in the mortgagor impliedly negatived by S. 60, and is of course, in direct conflict with the rights and liabilities arising from the language of the document. When I am asked to read this equity into the statute and am

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pressed with the language used by the learned Judges of this Court and of other courts I can only refer to the language of Lord Macnaughten in *Norendra Nath Sircar* v. *Kamal Basini Dasi* [1], adopting the language of Lord Herschell in the *Bank of England* v. *Vagliano* [2], which is, in effect, as follows, that the proper course is to examine the language of the statute uninfluenced by any considerations derived from the previous state of the law. If the statute is intended to embody in a code a particular branch of the law, the purpose of such statute surely was that the law should be ascertained by interpreting the language used and not by enquiring how the law previously stood. Bearing in mind that the chapter relating to mortgages in the Transfer of Property Act is as distinctly a "Code" as any enactment could be, in that it begins by defining a mortgage, and seeing that its provisions contain several equities known to English Law, I must with the greatest deference to the views taken by other Judges, decline to introduce provisions which the legislature has not thought fit to incorporate in the Act.

I now proceed to consider the question from another point of view. The mortgage is a simple mortgage under which each of the mortgagors bound himself personally to pay the mortgage money. Under S. 68 of the Transfer of Property Act, the mortgagee has a right to sue the mortgagor for the *mortgage money* where the mortgagor has bound himself to repay the same. There is no equitable limitation here and a reference to the Contract Act shows that no such limitation can be introduced. S. 43 of the Indian Contract Act provides that any one of joint promisors may be compelled to perform the whole of the promise and S. 44 specifically enacts that where two or more persons have made a joint promise, a release of one of such joint promisors by the promisee does not discharge the other joint promisor. This is the very point under consideration in this case and it is to be noted that these two sections 43 and 44 give the right of contribution to joint promisors and also specifically provide that the release of a joint promisor by the promisee does not free such promisor from responsibility to the other joint promisors. I fail to see how it can be argued that a mortgagee in a mortgage suit can only ask for sale of the mortgaged property for a rateable proportion of the mortgage debt, when on his claim on the cove-

1. (1896) I. L. R. 23 C. 563. 2. (1891) A. C. 107.

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Napier, J.

nant to pay he is entitled to judgment for the whole amount with, as a necessary corollary, a right to levy execution against the land. If there is an equity here, it operates strangely, for, its only result will be, not to protect the mortgagor but to give some advantage to a subsequent mortgagee if there be one.

Reliance is placed on the view embodied in *Ponnusami Mudaliar* v. *Srinivasa Naicken* [1]. There the learned Judges accept the statement of the law contained in Mr. Ghose's Law of Mortgages dated 1875 prior to the Transfer of Property Act. With the very greatest deference I cannot follow the Court in disposing of the case without reference to the provisions of the Act; but this case does not help the respondent as the proposition stated is covered by Ss. 56 and 81 of the Act. The learned Judges in *Krishna Iyer* v. *Muthukumarasami* [2], the case containing the *obiter dictum* relied on by the lower Court quote with approval two cases *Lala Dilwara Sahai* v. *Dewan Bolakiram* [3], and *Raghunath Pershad* v. *Harlal Sadhu* [4], which lay down that the mortgagee is entitled to realise the whole debt upon the whole property, the right to contribution being only as between the defendants, though they limit it in a manner expressly provided by S. 81. The decision in *Krishna Iyer* v. *Muthukumarasami* [2], was considered by the High Court of Allahabad in a later case in *Sanwal Singh* v. *Ganeshi Lal* [5], and the Court adopted as correct the broad proposition, without any reservation, that where two properties are jointly mortgaged for the same debt each of these properties is liable for the whole debt and it is open to the mortgagee to proceed either against the whole of the mortgaged property or against a part only of such property; and the proposition is stated equally broadly by a Full Bench of the same court in an earlier case *Sheo Tahal Ojha* v. *Sheodan Rai* [6]. It is true that a different view appears to have been taken by the High Court of Calcutta in *Imam Ali* v. *Brij Nath Ram Sahu* [7]. But there the learned Judges were considering the case of an assignee of the equity of redemption,— a case which is covered by S. 56 of the Act, and no authority on the construction of any section of the Act is quoted for the proposition stated on page 622, that a mortgagee, who has a security upon two or more properties, which he knows, belong to

1. (1908) I. L. R. 31 M. 333.
2. (1905) I. L. R. 29 M. 217.
3. (1885) I. L. R. 11 C. 258.
4. (1891) I. L. R. 18 C. 320.
5. (1913) I. L. R. 35 A. 441.
6. (1906) I. L. R. 28 A. 174.
7. (1906) I. L. R. 33 C. 618.

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different persons cannot release his lien upon the one so as to increase the burden upon the others without the privity and consent of the persons affected." With the greatest deference I know of nothing in the Act to support this limitation and it is to be noted that in a later case in *Mir Esuff* v. *Panchanan Chatterjee* [1], Mr. Justice Mookerjee, who was a party to the prior case, limits it specifically to cases where the release took place after the purchase of an interest in the mortgage premises and considers it inapplicable to the case where the mortgagors alone were the persons affected by the release. Nothing could be more definite than the following language used by that learned Judge in this last case. "It is a firmly settled doctrine that as between the original parties the release of a part of the premises does not affect the lien of the mortgagee upon the residue which is bound for the whole debt (vide page 647)." In this view I entirely concur, for the simple reason that, both by the language of the mortgage and the language of the sections of the Transfer of Property Act no equity arises as between mortgagors and mortgagee which limits the mortgagee's rights and I would refer to the language used by Lord Davey in *Webb* v. *Macpherson* [2], with reference to an endeavour to apply English equities to the Transfer of Property Act. The question arose as to a vendor's charge under the Act and the Board's view is stated on page 72. The English Vendor's lien was a creation of the court of equity and could be modified to the circumstances of the case by the court of equity. But in the present case there is a statutory charge. Such a charge stands in quite a different position from a vendor's lien. You have to find something, either express contract, or at least something from which it is a necessary implication that such a contract exists, in order to exclude the charge given by the statute. What was sought to do in that case was certainly different to what is sought here. But it appears to me that the Privy Council were insisting in that case, too, on the construction of the Statute, apart from equitable principles introduced by courts of Chancery in England.

For the above reasons, I would reverse the decision of the Lower Courts and make a preliminary order for sale as prayed for in the plaint.

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1. (1910) 11 C. L. J. 639. 2. (1903) I. L. R. 31 C. 57.

PRIVY COUNCIL.

Present:—Lord Shaw, Sir George Farwell, Sir John Edge and Mr. Ameer Ali.

[On Appeal from the High Court at Allahabad.]

Ganga Sahai and others .... *Appellants*.

v.

Kesri and others .... *Respondents*.

P. C.
Ganga Sahai
v.
Kesri.

Hindu law—Mitakshara school—Cousin of full blood and paternal uncle of half blood—Mortgage—Joint Decree under Transfer of Property Act of 1882, Ss. 88 and 89—Application for execution—Reservation in favour of joint-decree-holder—Auction sale—Purchase by one of co-mortgagees—S. 317 of Civil Procedure Code of 1882—Fraud.

Where two persons A and B jointly advanced money on a mortgage and obtained a decree for sale but only one of them applied for execution (expressly reserving however the rights of the other) and purchased the property in his own name.

Held, that S. 317 of the Civil Procedure Code of 1882 which was only designed to check benami purchases in the interests of judgment-debtors, in no way affected the title of persons otherwise beneficially interested in the purchase and that the Courts in India were perfectly right in refusing to allow the defendant to perpetuate a fraud against the plaintiff, his co-decree-holder who was entitled to share in the properties purchased, to the extent of his interest in the joint decree.

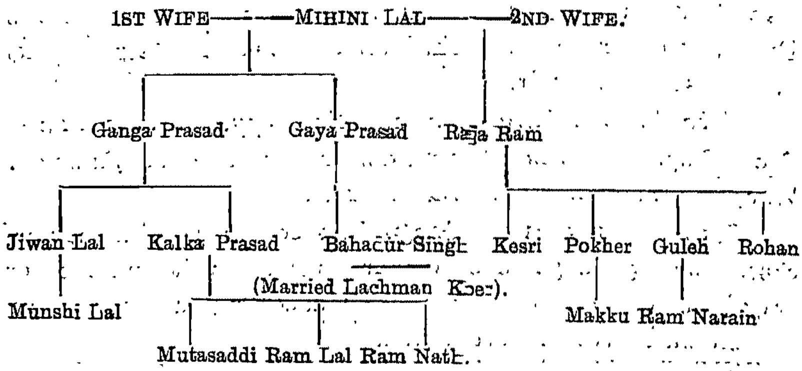
Boodh Singh Doodhini v. *Gunesh Chunder Sen* 1, approved.

The preference of whole blood to half blood under the Mitakshara applied only to sapindas of the same degree of descent from the common ancestor and did not apply to persons of different degrees.

Held, accordingly that an uncle of the half blood was entitled to succeed in preference to an uncle's son of the full blood.

Suba Singh v. *Sarfraz Kunwar* 2, approved.

Consolidated Appeals from judgments and decrees of the High Court at Allahabad, dated April 9 1910 and April 13, 1911, respectively reversing the judgments and decrees of the Subordinate Judge of Farrukhabad, dated December 10, 1906.



18th July 1915.

1. (1874) 12 Beng. L. R. 317 (P.C.). 2. (1896) I. L. R. 19 A. 215.

P. C.

Ganga Sahai v. Kesri.

Bahadur Singh died leaving the properties in question and the competing heirs were Raja Ram, half brother (consanguine) of Gaya Prasad, and Jivan Lal and Kalka Prasad, sons of Ganga Prasad, Bahadur's uncle's sons.

[The facts are fully stated in the judgment].

Ross, K. C., and *Kenworthy Brown* for Munshi Lall, and others contended that the judgment of the High Court was based on the view expressed in Madan Parijata which was wrongly regarded as an authority on the Mitakshara. In Stokes' Hindu Law Books (Introduction, p. 7) Madan Parijata was described as being of no authority on the Mitakshara. In Morley's Digest (Introduction) it was stated as not an authority in the Benares School at all.

The basis of inheritance according to Mitakshara was propinquity. There was no proper propinquity in the present case as half bloods were not so near as full bloods. In the case of brothers and their sons it was clearly laid down by the Mitakshara that a half brother was to succeed in preference to a nephew of full blood. This could not apply to uncles and their sons as it was expressly left undefined by the Mitakshara.

Those of half blood were remote both in point of propinquity and worship. Mayukha has expressly stated the preference of cousin of full blood over half uncles. All authors had drawn upon Manu and the root principle of the Hindu law was to prefer full blood. At the very worst the view of Mitakshara regarding brothers was an exception and contrary to the general scheme.

Reference was made to

Mitakshara, Ch. II, Sec 3, 4 and 5 *verse* 4, Stokes', Hindu Law Books, Saravadhikari's Hindu Law of Inheritance, Morley's Digest, Introduction, *Manu* Ch. 9, *verse* 21 and 217, Sacred Books of the East, Vol. II, Pt. 2.

Suba Singh v. *Safraz Kunwari*[1] *Nacheappa* v. *Rangaswami* [2] *Sham Singh* v. *Kishen Sahai*[3] *Ramchandra Martand Waikar* v. *Vinayak Venkatesh* [4] *Vithalrao* v. *Ramrao* [5].

Lowndes on behalf of Ganga Sahai contended that the purchase made by Ganga Sahai was for his sole benefit and rest for or on behalf of the heirs of the said Bahadur Singh and referred to.

Kalka Prosad v. *Basant Ram* [6].

1. (1896) I. L. R. 19 A 215
2. (1914) 28 M. L. J. 1.
3. (1907) 6 C. L. J. 190.
4. (1914) 41 I. A. 298=27 M. L. J. 333.
5. (1899) I. L. R. 24 B. 30, p. 317.
6. (1914) I. L. R. 28 A. 346.

De Gruyther, K. C., and *Dube* for Kesri and other respondents, contended that the whole principle of succession was laid down by the Mitakshara. If it was governed by the consideration of Sapindaship, it must apply to brothers. (*Mr. Ameer Ali* : Is not whole blood more nearly related ?) Once persons of the same class were taken, full blood came first. The nearest Sapinda, full brother succeeded first ; no nephew could succeed in preference to brothers. Heirs were to succeed "successively ". It was wholly unnecessary for the Mitakshara to have mentioned that the same principle governed the succession among " uncles and their sons " as applied to brothers and their sons. Madana Parijata was a Commentary on Hindu Law. The rule was that the nearest Sapinda succeeded.

(*Lord Shaw* :—Uncle should come first.)

Reference was made to Stokes' Hindu Law Books, p. 407, 445 and 446, Mayne's Hindu Law, para 569.

Ross, K. C., in reply

The Judgment of their Lordships was delivered by

Mr. Ameer Ali.—These several consolidated appeals from certain decrees and judgments of the High Court of Allahabad arise out of three suits brought in the Court of the Subordinate Judge of Farrukhabad. The plaintiffs in two of these suits, claiming adversely to each other to be the heirs of one Bahadur Singh, deceased, sought to recover from the appellant Ganga Sahai a one-third share of the properties specified in their respective plaints which he had purchased at a sale held in execution of a decree upon a mortgage to which reference will be made presently. The third suit was brought by Kalka Pershad, one of the plaintiffs in the above suits, to recover from the respondent Chunni Lal certain shares in Mouzah Malkapur belonging to the estate of Bahadur Singh which had been conveyed to him by one Gulab Koer, Bahadur's stepmother.

Their Lordships propose to deal first with the two suits in which Ganga Sahai was the defendant.

The mortgage-bond referred to above was executed so long ago as the year 1869 by one Jai Chand Chowdry, in favour of Bahadur Singh and Debi Din, the ancestor of Ganga Sahai, hypothecating two villages named respectively, Tahsipur and Bilaspur. One-third of the amount advanced on this transaction admittedly belonged to Bahadur Singh, and the other two-thirds

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to Debi Din. On default of payment by Jai Chand, a suit was brought in 1891 by Bahadur Singh in conjunction with Bhima Singh and Ganga Sahai, the heirs and representatives of Debi Din (who had died in the meantime). Bahadur Singh died during the pendency of the suit, and his widow, Lachman Koer, was brought on the record in his place. On the 21st November 1891, the usual mortgage decree under Section 88 of the Transfer of Property Act (IV of 1882) was was made by the Court. This was followed on the 27th of April 1893 by the final decree under Section 89 of the Act.

It appears from the record that Lachman Koer died somewhere in 1894. On the 20th December 1897, Ganga Sahai applied for execution of the mortgage-decree against the heir and representative of the mortgagor. In this application he expressly reserves the rights of Lachman Koer's heirs. The passage in question is important in view of the contention now raised by him. He states:—

"Bhaman Singh, another decree-holder, has died a natural death. His sons, "Mauji Ram and Raj Kunwar, are his heirs; but they do not join in the application, hence, under (section) 231 of the Code of Civil Procedure, this decree-"holder alone makes this application, and prays that the decree may be executed "subject to the rights of the heirs of Musammat Lachman Kunwar and Bhaman "Singh."

Bhaman Singh is evidently the same person as Bhima Singh.

The mortgaged properties were accordingly put up to sale on the 20th of February 1899, and purchased by Ganga Sahai. The sale appears to have been duly confirmed and two sale certificates were issued to him in respect of Tahsipur and Bilaspur respectively, and he is admittedly now in possession of the properties.

The two sets of plaintiffs, as already stated, claim to be the heirs of Bahadur Singh adversely to each other; but as against the appellant Ganga Sahai, they seek identical relief. They say that the purchase by Ganga Sahai of the properties in question was not exclusively for himself, but for the benefit of the heirs and representatives of both mortgagees. The courts in India have upheld their contention. Ganga Sahai has appealed to this Board and takes his stand on the first clause of section 317 of the Civil Procedure Code of 1882, which was in force in the sale took place. That clause provides as follows:—

"No suit shall be maintained against the certified purchaser on the ground "that the purchase was made on behalf of any other person, or on behalf of some "one through whom such other person claims."

In their Lordships' opinion the provisions of that section have no application to the present case. They were designed to create some check on the practice of making what are called *benami* purchases at execution sales for the benefit of judgment-debtors, and in no way affect the title of persons otherwise beneficially interested in the purchase. An example of this will be found in the case of *Boodh Singh Doodhoria* v. *Gunesh Chunder Sen*.[1], decided by this Board in 1873.

The Courts in India were perfectly right in refusing to allow Ganga Sahai to perpetrate a fraud against his co-decree-holders under cover of this section. His application for execution was under section 231 of the Code, and it was made subject to their rights. Had he not even embodied this reservation in his petition, the Court executing the decree would have of its own motion protected the interests of the other decree-holders. Their Lordships agree with the Courts in India that the heirs and representatives of Bahadur Singh are entitled to recover from Ganga Sahai a one-third of the properties purchased by him in execution of the joint mortgage decree.

The question then arises who among the two sets of plaintiffs are entitled to the inheritance of Bahadur Singh. At the time of his widow's death in 1894, when the succession passed to the collaterals, Rajaram, his uncle by the half blood, was alive; and he claimed the properties in preference to Kalka Pershad and Jivan Lall, the sons of a full paternal uncle named Gunga Pershad. Rajaram has since died and is now represented by his sons and grandsons who are plaintiffs in one of the suits and respondents before this Board. Jian Lall has also died, and his son, Munshi Lall, now stands in his place. Kalka Pershad and Munshi Lall were the plaintiffs in the second suit, and they claimed in opposition to Rajaram to be the heirs of Bahadur Singh by virtue of their relationship to him being of the whole blood.

As the question of heirship was involved in all the three suits they appear to have been tried together; and the Court of first instance held in favour of Jivan Lall and Kalka Pershad mainly on the authority of a decision of the Allahabad High Court, which it considered had settled the rule of succession in favour of the heirs related by the whole blood. The District Judge affirmed this decree. On appeal, however, to the High Court, the learned

1. (1874) 12 Bengal Law Reports, p. 317.

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Judges explained that in their judgment in *Suba Singh* v. *Sarfaraz Kunwar* [1] on which the lower Courts had relied, they had laid down no such principle as had been inferred; what they meant to decide was simply this, that under the *Mitakshara* the distinction of whole blood was not confined to the brother and his sons but extends further. And on an examination of the doctrines of the *Mitakshara*, they held in effect that this preference of the whole blood to the half blood applied to *sapindas* of the same degree of descent from the common ancestor, and did not apply to persons of different degrees. They were accordingly of opinion that Rajaram being paternal uncle of the half blood was entitled preferentially to the inheritance of Bahadur Singh to the exclusion of his cousins, although they were the sons of an uncle of the whole blood. They accordingly dismissed the claim of Munshi Lall and Kalka Pershad in their suit against Ganga Sahai and others, as also the claim of Kalka Pershad in his suit against Chunni Lall. They at the same time decreed the claim of Rajaram's representatives against Ganga Sahai. Munshi Lall and the representatives of Kalka Pershad, who died during the pendency of the suit, have appealed to His Majesty in Council from these decrees to the High Court dismissing their claim; and the main contention advanced on their behalf is that, although the *Mitakshara* expressly provides for the succession of the half brother in preference to nephews of the whole blood, there is no such provision in respect of uncles; and further that as it provides for the succession of the grandmother on failure of the father and his descendants, it must follow that by the words "The uncles and their sons" Vijnaneswara meant that uncles of the whole blood and their sons should succeed in preference to the issue of another wife of the paternal grandfather. This argument, in their Lordships' opinion, would apply with equal force to the case of half brothers and the sons of brothers of the whole blood. But it is conceded that the author of the *Mitakshara* has expressly declared that brothers of the half blood come before nephews of the whole blood, and in principle they see no reason to differentiate between the brothers of the *propositus* and the brothers of his father. Having regard to the general scheme of the *Mitakshara*, their Lordships think that the preference of the whole blood to the half blood is confined to members of the same class, or

1. (1896) I. L. R. 19 All. 215.

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to use the language of the Judges of the High Court in *Suba Singh* v. *Sarfaraz Kunwar* [1] to sapindas of the "same degrees of descent from the common ancestor," and that therefore on the death of Lachman Koer, Rajaram as uncle of the half blood became entitled to the inheritance of Bahadur Singh to the exclusion of his cousins.

In the result, all the appeals will be dismissed. Kesri and the other respondents in Appeal 83 of 1912 will have all their costs from the appellant Ganga Sahai. There will be no order as to costs with regard to the other parties.

And their Lordships will humbly advise His Majesty accordingly.

Solicitors for appellants: *Douglas Grant*; *T. L. Wilson & Co.*

Solicitors for respondents: *Barrow, Rogers and Nevile, T. L. Wilson & Co., T. C. Summerhays & Son, Douglas Grant.*

PRIVY COUNCIL.

Present:—Viscount Haldane, Lord Shaw, Sir George Farwell, Sir John Edge and Mr. Ameer Ali.

[On Appeal from the High Court at Allahabad.]

Mussammat Bilas Kunwar ... *Appellant.* *

v.

Desraj Ranjit Singh and others ... *Respondents.*

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Mussammat Bilas Kunwar *v.* Desraj Ranjit Singh.

Benami purchaser—Test—Comparison with English law—Estoppel—Landlord's title—Denial by tenant—S. 116, Evidence Act—Practice—Inference —Non-production of document.

Benami dealing is common to Hindus and Mahomedans alike and is quite unobjectionable.

It resembles the English rule that the trust of a legal estate results to the man who pays the purchase money. The exception in that law by way of advancement in favour of wife or child does not apply in India but the relationship is a circumstance which is taken into consideration in determining whether the transaction is benami.

The general rule in the absence of all other relevant circumstances is, as stated by Lord Compbell in *Dhurm Debia Pandey* v. *Mussumat Shamsundari Debia* 2 "to consider from what source the money comes with which the purchase money was paid."

Where A, a Hindu, purchased a bungalow in the name of his Mahomedan mistress, B, but it appeared that he had already made provision for her two sons by him and possession remained with him and his wives during his lifetime and after his death with one of his widows.

Held, that the natural inference was that the purchase was *benami* for A.

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* 13th July, 1915.

1. (1896) I. L. R. 19 All. 215. 2. (1843) 3 M. I. A. 229.

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Held, further, that the Court was not entitled to draw any inference against the plaintiff, the widow, from the non-production of account books relating to the estate as these did not necessarily form any part of her case and if any entries relating to the bungalow appeared therein it was for the defendant to have summoned for them and to have got them admitted in evidence.

It is open to a litigant to refrain from producing any documents which he considers irrelevant; if the other litigant is dissatisfied, it is for him to apply for an affidavit of documents and to obtain inspection and production of all that appears to him in such affidavit to be relevant and proper. If he fails so to do, neither he nor the court at his suggestion is entitled to draw any inference as to the contents of any such documents.

S. 116 of the Indian Evidence Act rests on the principle well established by many English cases that a tenant who has been let into possession cannot deny his landlords' title however defective it may be so long as he has not openly restored possession by surrender to the landlord.

Held, accordingly, that a tenant who had been let into possession by the plaintiff was estopped from denying her title in a suit brought by her against him for possession after due notice to quit, relying upon his purchase from B.

One Raj Bisheshar Bakhsh Singh was a taluqdar of Oudh with an annual income of Rs. 60,000. He had two Hindu wives, Balraj Koer and Bilas Koer, one of whom bore him a daughter only. By his Mohammedan mistress, Jagmar Bibi, he had two sons, Zahir-ul-Hasan and Zahin-ul-Hasan. In 1887 he bought a bungalow, in Stanley Road, Allahabad, in the name of Jagmar for Rs. 9,000 whose name was recorded as owner, in the Municipal registers and who always paid the ground rent in respect thereof and received such profits as assessed. In 1888 he acquired for his sons possession of a village as mortgagees. He died in 1890. During his lifetime his mukhtear and other servants looked after the bungalow and the same arrangement continued after his death. In 1900 Dr. Desraj Ranjit Singh went into occupation of the bungalow and in 1905 bought the same from Jagmar and her sons. The senior widow Balraj Koer instituted a suit for the recovery of the possession of the bungalow. The Subordinate Judge decreed the suit in favour of the plaintiff, but on appeal the same was reversed. The statement of Roshni Lall, barrister-at-law that the taluqdar had stated to him that the bungalow was bought for Jagmay on whose behalf it was let it to him and the possession of the title-deeds by Jagmar were relied upon to support her title. The appellant whose name was substituted on the death of Balraj Koer, her co-widow, then obtained leave to appeal to the Judicial Committee of the Privy Council in due course.

Sir E. Richards, K.C., and *Ross K. C.*, for the appellant contended that there were two questions involved in this appeal: (1)

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benami transaction, and (2) estoppel. By Sec. 116 of the Indian Evidence Act, the respondents who had obtained possession of the bungalow as tenant, for the appellant, and to whom they paid rent regularly were estopped from denying the appellant's title, unless and until they had given up the possession thereof and then re-took possession of the same. The transaction was really benami according to the habit of the people of India who often buy properties in the name of others. The bungalow was bought for the use of the taluqudar and his Hindu wives to be used for kalabbas at Allahabad. It was of no use whatever to Jagmar who lived at a great distance from the place, nor was it any good from the point of view of income, as it was very little indeed and sometimes none at all. In all purchases in a joint Hindu family the presumption was that they were acquired for the benefit of all, although they might have been bought in the name of one only. As to the non-production of the general account books, it was not the duty of the appellant to do so. She did not rely upon them at all. If the respondents wished them to be produced they ought to have given notice calling for their production at present, there could be no presumption in favour of the respondents on this account.

Reference was made to

Smith's Leading cases, Vol. II, p. 831, 11th Edn: *Davis' case* [1] *Bradley's case* [2], *Doe Baytap* [3]; Transfer of Property Act (1882) Sec. 108 (8).

De Gruyther, K. C., for the respondents contended that neither the Hindu nor the Mohammedan law had any bearing on the question. The real question was whether it was not bought for Jagmar.

Lord Haldane.—The whole question is whether it was benami. This depends on the habit of the country as to who would be entitled to the beneficial interest.

There is no special law on this point in India.

Sir John Edge.—The whole question is whether he bought it for himself or for the woman.

That was really the question.

Lord Haldane.—If the property is bought with the money of some one, is not the burden of proving title thrown upon that one in whose name it was bought?

1. (1835) 4 M. & S. 341. 2. (1848) 5 C. B. 396, 400.
3. (1835) 3 A. & E. 188.

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There were two witnesses who stated that the bungalow was bought for the benefit of Jagmar. One of them was an old servant of some 43 years' standing. The income from the bungalow always went to Jagmar. As the taluqdar was in debt, he bought it in order to make further provision for his mistress who would not be entitled to anything after his death.

Lord Shaw.—It did not occur to them then. It appears that the lady's lawyers hit upon the idea of explaining the transaction by stating that he was in debt.

Either it was benami or not.

Sir John Edge.—You have no evidence to support it.

There was not the slightest proof that it was. There was no reason why it should not be regarded as a gift. As he had no children except a daughter of Bilas by his wives and two boys by Jagmar it was perfectly reasonable that he bought it for them. Jagmar executed in 1888 a power-of-attorney which was produced for inspection of the lower Court and it related to property in question.

Lord Shaw.—There is a deed in existence executed by her and shown in Court. He had ample time to change his mind if he wished to.

Lord Haldane.—You say that the story that it now got into her possession is untrue.

Lord Shaw.—On the question of title it is relevant to show (1) delivery, and (2) the deed being kept in the catalogue of the estate deeds.

It was not in the catalogue. As Jagmar lived in Pentalgarh and had only two servants to manage her only village since 1876, the house was looked after by taluqdar's servants. The statement of Roshan Lall in support of Jagmar's claim was undisputed. Jagmar could not offer any objection to the use of the house of the talukdar. She was invited to ceremonies and the widows were on good terms with her. If the talukdar did not change his mind the natural state of things would be that it was bought for her benefit.

Sir E. Richard replied.

The judgment of their Lordships was delivered by

Sir George Farwell.—This is an appeal from a judgment and decree, dated 10th May 1910, of the High Court at Allahabad, which reversed a judgment and decree, dated 26th August 1908,

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of the Judge of the Small Causes, Court of Allahabad, exercising the powers of a Subordinate Judge.

Rai Bisheshar Bakhsh Sing was a taluqdar of Oudh; he was a man of some wealth, a Rajput of good position; he had two Rajput wives but no son; he had, however, one daughter by one of the wives. He had also a Mohammedan mistress named Jagmar Bibi, by whom he had two sons, and for whom he had made provision on a fairly liberal scale, and had given full possession thereof in 1876 and in 1888. On 9th June 1887, the taluqdar purchased for Rs. 9,000 the bungalow in dispute in this action; he raised the purchase money by a mortgage on his own property and paid for it, and had the sole use and enjoyment of it for himself and his wives during his own life, but the deed of sale was made out and registered in Jagmar's name. The taluqdar spent money on the house, built a well and walls and kept a gardener in occupation, he and his wives lived there, and the mother of one of his wives lived and died there. His wives used the bungalow by his permission for "Kalabbas"—*i.e.*, to live at the bank of the Ganges for religious purposes for a month at a time; the purchase seems to have been made for the purpose of the Kalabbas. Jagmar Bibi was never in the bungalow during this period; she would, of course, as a Mahomedan mistress, have no part or lot in the Hindoo religious observances of Rajput wives and it is inconceivable that she could have associated in any way in the bungalow with them.

The bungalow was useless to her for any personal use, and it was wholly inappropriate as a provision for her if the taluqdar ever had any intention or idea of making a further provision for her; the net income was very small—in some years the out-goings exceeded the income. There is no evidence of any intention to give the bungalow to Jagmar as a provision for her or otherwise beyond the bare fact of the registration in her name; it is not clear how or when she got possession of the title deed; it may be that it was in the taluqdar's possession at his death, and at some subsequent period. As the deed was made out in her name there is no importance in this. Down to the taluqdar's death the natural inference is that the purchase was a *benami* transaction; a dealing common to Hindoos and Mahomedans alike, and much in use in India; it is quite unobjectionable and has a curious resemblance to the doctrine of our English law that the trust of

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the legal estate results to the man who pays the purchase money, and this again follows the analogy of our Common Law that where a feoffment is made without consideration the use results to the feoffor. The exception in our law by way of advancement in favour of wife or child does not apply in India (*Gopreekist* v. *Gungapersaud* [1]), but the relationship is a circumstance which is taken into consideration in India in determining whether the transaction is *benami* or not. The general rule in India in the absence of all other relevant circumstances is thus stated by Lord Campbell in *Dhurm Das Pandey* and *Mussumat Shama Soondai Debiah* [2]. "The criterion in these cases in India is to consider "from what source the money comes with which the purchase "money is paid."

On the 31st August 1890 the taluqdar died, and by an agreement of 21st March 1894 between his two widows the possession and management on behalf of both was given to one of them, *viz.*, Thakurain Balraj Kunwar, and she has throughout managed the property in question. Whether any acts or omissions by any of the parties after the death of the taluqdar could affect the nature of the *benami* transaction as it stood at his death it is unnecessary to consider, for their Lordships are of opinion that nothing has been given in evidence which could have any effect at all on the transactions as *benami*. The evidence given by Jagmar is quite untrustworthy and she has not even called her sons whom she purports to vouch as actors on her behalf: the Trial Judge does not place any confidence in Roshan Lal's evidence, and his conduct certainly is open to comment. On the facts as accepted by their Lordships as the result of the evidence, all rates, rents and taxes and repairs and the ground-rent of the bungalow have been paid by the Thakurain. She has had possession of the premises by her servant Bhairon, and has let them to various tenants from 1891 down to the commencement of this action, the last tenant being Dr. Ranjit Singh, to whom the plaintiff let and gave possession in 1890 and to whom also she gave notice to quit on 13th October 1905.

On these facts their Lordships are of opinion that the transaction was and remains throughout *benami*. They are unable to agree with the opinion expressed by the High Court; they find no ground on which to treat a purchase by the taluqdar of such

1. (1854) 6 Moore Ind. App. 53. 2. (1843) 3 Moore Ind. App. 229.

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a property as this bungalow in the name of his Mahomedan mistress in a manner differing from that on which a similar purchase by a Hindu in the name of a complete stranger would be treated, nor is there any ground for asserting that the probabilities of the case or in favour of an intention by the Taluqdar to benefit his mistress; for the reasons stated above the exact contrary appears to their Lordships to be the case. The High Court Judges "attach great significance" to the non-production of the books showing the accounts of the general estate, and appear to draw an inference therefrom adverse to the plaintiff's claim; any such inference is, in their Lordships' opinion, unwarranted. These books do not necessarily form any part of the plaintiff's case; it is of course possible that some entries might have appeared therein relating to the bungalow. But it is open to a litigant to refrain from producing any documents that he considers irrelevant; if the other litigant is dissatisfied it is for him to apply for an affidavit of documents, and he can obtain inspection and production of all that appears to him in such affidavit to be relevant and proper. If he fails so to do, neither he nor the Court at his suggestion is entitled to draw any inference as to the contents of any such documents. There is no ground for any inference such as is made in the High Court that the books if produced would have shown rent credited to Jagmar or set off against some claim against her. They related to a different property, and the possibility of entries relating to the bungalow therein is very remote, but even if it had been greater, the Court was not entitled to draw any such inferences. It is for the litigant who desires to rely on the contents of documents to put them in evidence in the usual and proper way; if he fails to do so no inference in his favour can be drawn as to the contents thereof.

The other point in the case is one of estoppel. The property was let by the plaintiff to the defendant Ranjit Singh; he was let into possession by the plaintiff's gardener Bhairon, on her behalf and by her direction, and he regularly paid rent to her and applied to her to do all the necessary repairs; he has never given up possession to her although he duly received notice to quit, and he has denied her title. Section 116 of the Indian Evidence Act is perfectly clear on the point, and rests on the principle well-established by many English cases, that a tenant who has been

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let into possession cannot deny his landlord's title however defective it may be, so long as he has not openly restored possession by surrender to his landlord. The Subordinate Judge was clearly right on this point. The High Court appears to have been under some misapprehension, and Counsel for the respondents have not attempted to support their judgment on this point. Their Lordships are of opinion, and will humbly advise His Majesty, that the decree of the High Court should be reversed and that of the Trial Judge should be restored, and that the respondents should pay all the costs here and below.

Solicitors for Appellant: *T. L. Wilson & Co.*

Solicitors for Respondents: *Ranken Ford, Ford and Charter.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.
[FULL BENCH.]

Present:—Sir John Wallis, *Chief Justice*, Mr. Justice Ayling, and Mr. Justice Sadasiva Aiyar.

Jaldu Venkatasubba Rao ... *Appellant* (Petitioner Plaintiff).*

v.

The Asiatic Steam Navigation Company of Calcutta ... *Respondents (Respondent Defendants.)*

Venkatasubba Rao v. The Asiatic Steam Navigation Company.

C. P. C., of 1908, *O.* 21, *r.* 31—*Specific Relief Act S.* 11—*Suit for Specific moveable property—Allegation and proof—Onus on plaintiff—Limitation Act of* 1908—*Arts.* 31, 49 *and* 115—*Applicability—Carrier—Suit for compensation against—Suit for return of Specific moveable against—Limitation—Maxim "Generalia Specialibus non-derogant—" Application of.*

In order to entitle a person to obtain delivery of specific moveable property by suit and to enforce the decrees obtained by the stringent methods provided in Order 31, rule 31, of the Code of Civil Procedure, he should allege and prove facts which entitle him to compel the delivery of the specific moveable under the provisions of S. 11 of the Specific Relief Act.

The effect of the amendment in 1899 of Art. 31 of the Limitation Act is to make it applicable to a claim against a carrier for compensation for non-delivery of goods irrespective of the question whether the suit was laid in contract or in tort. Art. 49 is inapplicable to such a case.

Semble, Art. 49 applies when in a proper case a claim is made against a carrier for the return of a specific moveable.

Where, in a suit by a consignor against a carrier, the plaint asked for the return of the plank consigned but not delivered to the consignee and also for Rs. 21-12-0 being the loss of interest but contained no allegation that the defendant was in possession of the plank in question and it was obvious from the correspondence between the parties filed in the case that the defendant was not in possession thereof.

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* L. P. A. 250 of 14. 4th March, 1915.

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Held, that in so far as the suit could be regarded as a suit for the return of the specific plank, the case did not come within S. 11 of the Specific Relief Act, and the suit must be dismissed;

That, if the suit was regarded as one for compensation for failure to deliver the plank in breach of the contract under the bill-of-lading, it was governed by Art. 31 and not by Art. 49 or 115 of the Limitation Act

Appeal under Clause 15 of the Letters Patent against the Judgment of the Honourable Mr. Justice Tyabji, dated the 26th day of March 1914, in Civil Revision Petition No. 568 of 1913, presented against the decree of the Court of the Principal District Munsiff of Masulipatam in Small Cause Suit No. 1257 of 1912.

This appeal coming on for hearing on Tuesday, the 5th day of January 1915, and having stood over for consideration till Monday, the 18th day of January 1915, the Court (Spencer and Seshagiri Aiyar, JJ.) made the following

ORDER OF REFERENCE TO A FULL BENCH:—

Spencer, J. :—I have had the advantage of perusing the Judgment which my learned brother is about to deliver, but I regret that I have not been able to come to the same conclusion at which he has arrived.

It is contended that the suit having been brought for the delivery of specific moveable property, *viz*, a plank, or for its value, the plaintiff had 3 years within which to file his suit under article 49 of the Limitation Act.

In support of this contention the decision in *Murugesa Mudali* v. *Jotharam Davay* [1] is cited.

That was a suit against purchasers at a Court-auction to make them restore the goods purchased or their value as compensation.

The present is essentially a suit against a carrier for compensation for non-delivery of goods, and it has been held in *Haji Ajam Goolam Hoossein* v. *Bombay and Persia Steam Navigation Co.*, [2], and in *Great Indian Peninsula Railway Co.* v. *Ganpat Rai* [3], that the article applicable to such suits is article 31, or if the carrier loses or injures the goods then article 30, (*Great Indian Peninsula Railway Co.* v. *Raisett Chandmull* [4], the period of limitation under either of these articles in the present Limitation Act being one year.

In *The British India Steam Navigation Co.* v. *Hajee Mahomed Esack and Co.* [5], it was thought that, while article 30 would apply

1. (1899) I. L. R. 22 M. 478.
2. (1903) I. L. R. 26 B. 562.
3. (1911) I. L. R. 33 A. 545.
4. (1895) I. L. R. 19 B. 165.
5. (1881) I.L.R. 3 M. p. 107.

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to suits for compensation for loss or damage to goods carried, article 115 which allows 3 years' time for suing would apply to suits for breaches of contracts to deliver, but that decision was prior to the enactment of Act X of 1899, S. 3 of which inserted the words 'non-delivery of or,. in article 31. It is not now argued before us that article 115 applies. In *Danmull* v. *British India Steam Navigation Company* [1], which was also prior to Act X of 1899 the defendants denied that plaintiff had entrusted them with the missing goods. It was the case of neither party that the goods had been lost. *Mohan Singh Chawan* v. *Henry Conder* [2], was another case of non-delivery of goods prior to the enactment of 1899.

It may be that, when the words 'non-delivery of or' were inserted in this article, the grouping of the articles under the heads of suits upon contracts and suits upon torts was not heeded for convenience sake, seeing that non-delivery by a common carrier is first and foremost a tort as observed by Garth, C. J. in *Moothora Kant Shaw* v. *The India General Steam Navigation Co.* [3], though an action against a common carrier may be founded either on contract or on tort (*vide* Bullen and Leake on Pleading. 6th Edition page 139). The division between suits on torts and suits on contracts is not strictly observed in the schedule, for articles 48 and 49 include cases of tort, and they are after article 36.

It seems to me that the legislature intended to provide exceptionally for the case of carriers on account of the difficulty of investigating and settling claims preferred against them after a long lapse of time in respect of a few articles out of the quantity of goods that are constantly passing through their hands.

Now the plaintiff cannot be allowed to extend the period of limitation by the dodge of demanding that the very goods themselves should be delivered to him, when the defendants have stated in a letter to him (see Exhibit A (1)) that, owing to the long delay caused by the plaintiff in not producing the invoice in support of his bill, they find it difficult to check the shortage and have on that account pleaded non-liability to account to him. The mere allegation in the plaint that there was non-delivery implies a breach of the contract to carry although the facts may disclose a tort also on the part of the carrier, but the date within which the

1. (1886) I. L. R. 12 C. p. 477. 2. (1882) I. L. R. 7 B. p. 478.
3. (1883) I. L. R. 10 C. p. 166 at p. 186.

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p . tiff must file his suit will not depend on the defence set up in t written statement. So plaintiff cannot run the risk of waiting t he knows what the defence will be but must come to Court within the period allowed by the legislature for claims based on non-delivery.

It was pointed out in *Murugesa Mudali* v. *Jotharam Davay* [1] that the right to sue for the recovery of specific moveable property is governed by sections 10 and 11 of the Specific Relief Act I of 1877 and that an injustice would be likely to result from giving a decree for the recovery of the goods *in specie*, as such a decree might be enforced by attachment of the judgment-debtor's property and the imprisonment of his person while it might be impossible for him to obey the decree without the assistance of the persons in possession of the goods. The same remarks may be made as to carriers of goods who are unable to trace missing goods entrusted to them for delivery.

In the present case the only decree that the plaintiff could have obtained upon the pleadings, if he had sued in time, would have been a decree that the defendants should pay him compensation for non-delivery of the plank in question Article 48 or 49 cannot be applied since under column 3 of the schedule time has not begun to run and thus there is no cause of action for a suit under either of these articles.

I consider therefore that the learned Judge was right in holding that the suit fell under article 31 of the Limitation Act and that this Letters Patent Appeal should be dismissed with costs.

Seshagiri Aiyar, J.—I have come to a different conclusion. The facts are these: 61 planks of teakwood were consigned at Moulmein in May 1909 through the defendant company for delivery to the plaintiff at Masulipatam. The defendants delivered only 60 planks on the 28th August 1909. This suit is brought on the 16th June 1912 for the recovery of the one plank of wood undelivered (the Court was closed from the 5th May to the 16th June). The prayer in the plaint is in these terms:

"(*a*) directing the defendant to deliver to the plaintiff the plank worth Rs. 60-15-0 as per the copy of the bill field herewith, as also Rs. 21-12-0 being the loss of interest.

1. (1899) I. L. R. 22 M. p. 478.

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(b) "or else directing the defendant to pay to the plaintiff Rs. 60-15-0, the value of the teak plank, Rs. 21-12-0 for interest, in all, Rs. 82-11-0 together with subsequent interest." The defendants pleaded the bar of limitation.

The District Munsif held that article 31 of the Limitation Act applied and that as the suit was brought more than a year after the date on which the plank should have been delivered, he decided that the claim was barred by limitation. Mr. Justice Tyabji on revision agreed with this view. This Letters Patent Appeal is against that decision.

Article 31 is among a group of articles dealing with compensation. The word compensation used in articles 17 and 18 has not the same meaning as in the subsequent articles but from articles 19 to 31, the term is used to denote a claim for damages; and in almost all the cases the cause of action is in tort. As was pointed out by Garth, C. J., in *Moothara Kant Shaw* v. *The India General Steam Navigation Company* [1], the ordinary liability of a common carrier is founded on custom, and "a common carrier is and always has been liable to be sued for any breach of this common law duty *in an action of tort*." This accounts for the inclusion of carriers in the category of cases relating to the award of compensation for torts. It was pointed out in *The British India Steam Navigation Company* v. *Hajee Mahomed Esack and Company* [2], that the position of article 31 suggests that it was intended to cover cases of malfeasance, misfeasance and nonfeasance independent of contract. Garth, C. J., in *Danmull* v. *British India Steam Navigation Company* [3], points out that the shorter period of limitation provided by the article will not govern breaches of contract. Wilson, J., takes the same view. The fact that other cases relating to compensation from tortious acts are provided with a period of 2 years' limitation in subsequent articles only shows that in the cases of carriers and in the special cases referred to till article 31 is reached, the legislature wanted the grievances to be earlier dealt with. I was at first inclined to think that cases of compensation for breaches of contract would come under article 31. On further consideration, I think that the correct view

1. (1883) I. L. R. 10 C. 166. 2. (1881) I. L. R. 3 M. 107.
3. (1886) I. L. R. 12 C. 477.

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is to hold that in order to affect article 31 the claim must be founded only on tort. Article 36 is the residuary article in cases of torts. Article 49 provides for cases of compensation arising from a breach of contract; and the residuary article in regard to such matters is article 115. Although it is not easy to give a logical explanation for the arrangement of the articles in the Limitation Act, it seems clear from their grouping and from the position of the residuary articles that compensation for torts is provided for separately from compensation for breaches of contract. I feel no hesitation therefore in holding that article 31 does not relate to claims arising from contracts. It is true that the decisions to which I referred were passed before the legislature amended article 31 by inserting the words "or for non-delivery." But this amendment cannot enlarge its scope. The essential characteristic of the original article which must attach to it even after the amendment is that it deals with a claim for damages arising from a tortious act. A claim against a common carrier is not always restricted to damages. A carrier may have the consigned article in his possession and yet refuse to deliver it. Such an article may have something more than a commercial value to the consignee. In such cases he is entitled to ask for its delivery. Article 31 cannot cover such cases. The carrier in addition to the common law liability pointed out by Garth, C. J., may incur contractual obligations. See observations in page 186 of *Moothora Kant Shaw* v. *The India General Steam Navigation Co.* [1]. The enforceability of such obligations will depend on considerations different from those relating to the award of damages. Although a decree for delivery of specific moveable property may by virtue of Order XX, Rule 10, provide for the payment of its value in the alternative, the decree-holder can take steps for obtaining possession of the article itself. Mr. Chamier argued that as article 31 is the only provision relating to carriers, all cases against them are controlled by that article. I am unable to agree with this contention. Suppose, for instance, an honest carrier intimates to the consignee a year after the date fixed for its delivery that he is unable to trace it; Article 31 can give no relief in such cases. It would leave the consignee without any remedy. There are special provisions relating to the recovery of articles *in specie*;

1. (1883) I. L. R. 10 C. 166.

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and unless the language of these articles exclude claims against carriers, I see no reason for not applying them to the case of carriers as well. I am therefore of opinion that to the claim as laid, article 31 does not apply. In *Haji Ajam Goolam Hoossein* v. *Bombay and Persia Steam Navigation Company* [1], the suit was "for Rs. 750 as damages for the non-delivery of 35 out of 200 cases of oil." In *Great Indian Peninsula Railway Company* v. *Ganpat Rai* [2] also the claim was for damages. There was no relief for the delivery of the specific article in these cases and although to the Allahabad case, the latter portion of article 49 seems applicable, the point does not seem to have been argued. I do not think these cases are decisive of the point we have to decide in this case.

I think the claim falls under article 49. The language of the first part exactly covers this case. The view taken in *Murugesa Mudali* v. *Jotharam Davay* [3], is in accordance with this conclusion. If article 49 does not apply, article 115 will apply.

In *Moothora Kant Shaw* v. *The General Steam Navigation Company* [4], already referred to by me Garth, C. J. points out that "a carrier is liable to be sued in an action either of tort or contract, according to the convenience or advantage of the plaintiff," and he quotes Bullen and Leake in support of the position. In the forms of pleading given in that treatise, we have first of all statements of claims in contract; then come the statements of claims in tort; then follow forms for defences in actions of contract and afterwards similar forms for defence in actions in tort. These indicate that it is at the option of the consignee to sue in contract or in tort either for the specific article or for damages. In the present case the plaintiff has chosen to claim the article and he is entitled to choose that remedy.

By Court.—Having regard to the importance of the question involved and to the difference of judicial opinion that exists, we think it is desirable that the question should be referred for the decision of a Full Bench upon the following points :—

(1) "Whether article 31, 49 or 115 is applicable to a claim by a consignor against a carrier for the recovery of goods consigned to him or in the alternative their

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1. (1902) I. L. R. 26 B. 562.
2. (1911) I. L. R. 33 A. 545.
3. (1899) I. L. R. 22 M. 478.
4. (1883) I. L. R. 10 C. 166.

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value, and for interest upon the amount claimed as the value of the goods ?"

(2) "Whether upon the pleadings, this suit should be treated as a suit for specific moveable property lost, or as a suit against a carrier for compensation for non-delivery of goods ?"

P. M. Srinivasaiyangar for P. Nagabhushanam for Appellant:—

My contention is that art. 49 or Art. 115 applies and that the suit is not barred; art. 31 is essentially one which applies to suits where compensation is sought for. So also is art. 30.

[*Chief Justice.*—You cannot deny that any compensation must be recovered under art. 31. According to you, the first part of art. 49 applies and not the 2nd, as you have asked for the specific moveable or for compensation. According to you, therefore, in so far as the suit is for specific moveable, it is governed by art. 49 and in so far as it is for compensation, art. 31 applies.]

I have not asked for compensation. I have sued for the specific moveable. But, under the Civil Procedure Code, in such a case, I have to state the value of the moveable sought to be recovered. See Or. 21, r. 31 of the Code. Ss. 10 and 11 of the Specific Relief Act apply to this case.

[*Chief Justice.*—Those sections apply to cases in which the defendant has possession or control. In this case, defendant had neither control nor possession.]

That could only be known after trial. Under the bill-of-lading, defendant is bound to deliver all articles. By not doing so, he commits a breach of contract. Supposing he wrongfully withholds the article and informs me only after a year, what is my remedy.

[*Chief Justice.*—If he commits a breach, you are entitled to damages.]

[*Chief Justice.*—The allegations in your plaint do not bring your case under S. 11, cl. (*c*) of the Specific Relief Act.]

[*Ayling, J.*—You do not set out the circumstances necessary to bring your case under S. 11, cl. (*a*) of the Specific Relief Act.]

[*Chief Justice.*—If your suit was for the recovery of specific property, you must have alleged that it was in the possession of the defendant and that you wanted the specific property itself. But you have not done so.]

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[*Sadasivaiyar, J.*—In this case the finding is that defendant was not in possession. Hence your case falls under art. 31.]

Murugesa Mudali v. *Jotharam Davay* [1] decides that even if the suit is barred in respect of the claim for compensation, it will not be held to be barred if that claim is tacked on to the claim for the specific property itself.

In a suit for the recovery of moveable property, the plaintiff must give the value of the property sought to be recovered. O. 20, r. 10 of the Code of Civil Procedure and Form No. 32 of the Code.

Raja Goundan v. *Rangaya Goundan* [2] decides that a prayer for compensation does not by itself make the suit one for compensation within the meaning of art. 31. The principal relief claimed is the property itself.

The onus of proving the loss of the article is on the defendant. *Mohan Singh Chawan* v. *Henry Conder* [3].

[*Chief Justice.*—That case was one for compensation. It cannot help you.]

The British India Steam Navigation Company v. *Hajee Mahomed Esack and Company* [4].

[*Chief Justice.*—That was before the amendment of art. 31.] *Kallu Ram Maigraj* v. *The Madras Railway Co.* [5].

The distinction between a suit to enforce the terms of a contract and one which is for compensation based on the negligence of the carrier runs through many of the decisions and must be recognised. To a suit of the former class art. 49 applies, while art. 31 applies to one of the latter class *Hassaji* v. *The East India Railway Company* [6], *Danmull* v. *British India Steam Navigation Company* [7].

The words "independent of contract" in art. 36 make my submission clear. They show that the suits contemplated by the article are suits based on negligence and for compensation. The argument on the other side is that a suit against a common carrier comes within art. 31 whatever the relief claimed may be.

1. (1899) I. L R. 22 M. 478
2. (1897) I.L.R. 20 M. 449.
3. (1883) I. L R. 7 Bom 478.
4. (1881) I.L.R. 3 M. 107.
5. (1881) I.L.R. 3 M. 240 (245).
6. (1881) I. L. R. 5 M. 388.
7. (1886) I. L. R. 12 C. 477 (480).

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Kothandarama Chetty v. *The B.I.S.N. Co.*[1] negatives this contention. *Great Indian Peninsula Railway Co.*, v. *Ganput Rai*[2] no doubt, applies art. 31, but in that case the suit was for damages for non-delivery. *Haji Ajam Goolam Hoossain* v. *Bombay and Perna Steam Navigation Co.*,[3] is to the same effect. *G. I. P. Railway Co.* v. *Raisett Chandmull*[4] which may be cited for the other side, is also a suit for compensation.

The opinion of Farran, J., is against me. But it was unnecessary for the decision of the case. If the Legislature had intended all suits against common carriers to be governed by art. 31, why should the case of a claim for compensation have been specifically stated. The suit in the present case is for the recovery of specific property and the suit is quite *bona fide* in claiming property.

D. Chamier and *K. Pandalai* for Respondent were not called upon.

The Court expressed the following

Opinion:—Two questions have been referred to us; and it will be more convenient to deal with the second one first, "whether upon the pleadings, this suit should be treated as a suit for specific moveable property lost, or as a suit against a carrier for compensation for non-delivery of goods." If we look at the prayer of the plaint which asks for the return of the plank and also for Rs. 21-12-0 being the loss of interest, it may be treated as a suit both for the return of the specific plank and for damages for its detention. But in order to entitle the plaintiff to obtain delivery of specific moveable property by suit and to enforce the decree so obtained by the stringent methods provided in Order XXI, Rule 31 of the Code of Civil Procedure, it is necessary that he should allege and prove facts which entitle him to compel the delivery of the specific moveable under the provisions o S. 11 of the Specific Relief Act, because unless he does so, he cannot have a decree for the return of specific moveable property. There is no allegation in the plaint that the defendant is in possession of the plank in question and it is obvious from the correspondence that he is not. That being so, the case does not in our opinion come within Clause (*a*) of S. 11 of the Specific Relief Act and it certainly does not come within Clause (*b*), (*c*) or (*d*). In so far then, as the suit

1. (1910) 9 M. L. T. 169.
2. (1911) I.L.R. 33 A. 544.
3. (1902) I. L. R. 26 B. 562.
4. (189?) I.L.R. 19 B. 165.

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can be regarded as a suit for the return of the specific plank, the plaint discloses no cause of action, and the suit must be dismissed.

It may, however, as framed be regarded as a suit for compensation for failure to deliver the plank in breach of the contract under the bill-of-lading. That brings us to the first question in the reference, " Whether Article 31, 49 or 115 is applicable to a claim by a consignor against a carrier for the recovery of goods consigned to him, or in the alternative their value, and for interest upon the amount claimed as the value of the goods." As the Limitation Act of 1877 originally stood, there was a good deal of authority for saying that Articles 30 and 31 which deal with suits against a carrier for compensation for losing or injuring goods and suits against a carrier for compensation for delay in delivering goods did not apply. We need only refer to to the decision of Sir Charles Turner, C. J., and another learned Judge in *The British India Steam Navigation Company* v. *Hajee Mahomed Esack and Company* [1], and the other authorities cited in *Danmull* v. *British India Steam Navigation Company* [2], *and Great Indian Peninsula Railway Company* v. *Raisett Chandmull* [3]. This view proceeded largely upon the position of these articles among a number of other articles dealing with suits for damages for torts, and in his judgment in *Great Indian Peninsula Railway Company* v. *Raisett Chandmull* [3], Mr. Justice Farran (as he then was) expressed the opinion that this was a rather fallacious test and that in these rulings the Courts had not given effect to the intention of the Legislature, but stated having regard to the current of decisions it was rather for the Legislature to make its meaning more clear if it had been misinterpreted than for the Court to run counter to the decisions of the other High Courts. This was in the year 1894 and acting as we cannot doubt on this suggestion the Legislature in 1899 amended Article 31 by inserting the words "non-delivery of or," so as to make the article run: " against a carrier for compensation for non-delivery of, or delay in delivering, goods". It seems to us that by this amendment the Legislature clearly indicated its intention that Article 31 should apply to a claim against a carrier for compensation for non-delivery of goods irrespective of the question whether the suit was laid in contract or in tort. Even so it may be, as pointed out by one of

1. (1881) I. L. R. 3 M. 107. 2. (1886) I. L. R. 12 C. 477.
3. I. L. R. 19 B. 165.

the learned Judges who have referred the case, that Article 31 only deals with claims for compensation, and that Article 49 applies when in proper case a claim is made against a carrier for the return of a specific moveable which, as already pointed out, is not this case. In so far however as Article 49 applies to suits "for compensation for wrongfully taking or injuring or wrongfully detaining the same", it is in any case inapplicable to the facts here, and even if it were applicable, its operation would be excluded by the provisions of the special Article 31 as amended on the principle '*Generalia specialibus non derogant*'.

Our answer to these questions is that the suit must be regarded as a suit for compensation and as such it comes under Article 31.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Oldfield and Mr. Justice Sadasiva Aiyar.

Venkataramanujulu Naidu and another ... *Appellants**

v.

Ramasami Naidu ... ... *Respondent.*

Civil Procedure Code, S. 115 (a) and (c)—Applicability of, to Presidency Small Cause Courts Act—Suit in ejectment—Erroneous finding that lease has been determined—Decree based on that finding—Interference by High Court—No question of jurisdiction—Presidency Small Cause Courts Acts, S. 41.

The High Court has power under S. 115 of the Code to revise the decisions of the Presidency Small Cause Court.

Haladhar Maiti v. *Choytonna Maiti* [1], *Sarat Chandra Singh* v. *Brojo Lal Mukerjee* [2], *Ramadin Bania* v *Sewbalak Singh* [3], followed. *Ismalji* v. *Macleod* [4], dissented from.

The determination of a tenancy by a valid notice is not a condition precedent to the exercise of jurisdiction under S. 41 of the Presidency Small Cause Courts Act. Mere mistake in fact or in law is no ground for revision.

Held, that an order in ejectment under S. 41 of the Presidency Small Cause Courts Act based on an erroneous finding as to the validity of the notice given could not be interfered with in revision by the High Court.

Amir Hasan Khan v. *Sheo Buksh Singh* [5], referred to.

Vuppuluri Atchayya v. *Seetaramachandra Rao* [6] distinguished.

Appeal under S. 15 of the Letters Patent against the judgment of the Hon'ble Mr. Justice Seshagiri Ayyar, dated the 24th February 1914, in C. R. P. No. 354 of 1913, preferred against the

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*L. P. Appeal 221 of 1914. 20th July 1915.

1. (1908) I. L. R. 30 C. 588.
2. (1908) I. L. R. 30 C. 986.
3. (1910) I.L.R. 37 C. 714.
4. (1906) I. L. R. 31 B. 138.
5. (1884) I. L. R. 11 C. 6.
6. (1912) 24 M. L. J. 112.

Venkataramanujulu Naidu v. Ramasami Naidu.

decree of the Presidency Court of Small Causes at Madras in Ejectment Suit No. 91 of 1913.

[For the judgment of Seshagiri Aiyar, J. see 26 M.L.J. 467.]

N. Chandrasekhara Iyer for Appellants.

M. O. Parathasarathi Iyengar and *K. V. Krishnaswami Iyer* for Respondents.

The Court delivered the following

Judgment:—*Oldfield, J.*—On the first point dealt with by the learned Judge, this court's power to revise the decision of the Presidency Small Cause Court, I follow the Calcutta cases *Haladhar Maiti* v. *Choytonna* [1], *Sarat Chandra Singh* v. *Brojo Lal Mukerjee* [2]. and *Ramadhin Bania* v. *Sewbalak Singh* [3], in preference to *Ismalji* v. *Macleod* [4], decided in Bombay, the former moreover being in accordance with the practice in this presidency. The learned Judge's decision in favour of the existence of this Court's powers of revision must be sustained.

The question is then whether their exercise was justified in the case before him, one of a decree for ejectment under S. 41, Presidency Small Cause Court's Act, obtained on a finding as to the validity of the notice given, which the learned Judge held to be and which may for the present purpose be treated as being mistaken in law. It is revised because it was passed in the exercise (to follow the wording of S. 115 (*a*) of the Civil Procedure Code) "of a jurisdiction not vested in the Small Cause Court by law," inasmuch as the determination of the tenancy by a valid notice was a condition precedent to the exercise of jurisdiction under S. 41 and was not fulfilled.

This seems to me unsound, because the validity of the notice in question was no more a condition precedent to the exercise of jurisdiction than any other fact, the establishment of which might be necessary before a decree could be given, if other facts had been put in issue. And in fact the principle involved in the contention would, if accepted, entail that the court's powers under S. 115 (a) and (b) are co-extensive with its powers in appeal. So broad a principle requires strong authority to support it. But none has been adduced, and there is the clear language of th Privy Council in *Ameer Hassan Khan* v. *Sheo Buksh Singh* [5]

1. (1903) I. L. R. 30 C. 588.
2. (1903) I. L. R. 30 C. 986.
3. (1910) I. L. R. 37 C. 714.
4. (1907) I. L. R. 31 B. 188.
5. (1884) I.L.R. 11 C. 6.

show that the wrong decision of a question with which the court is competent to deal cannot affect its jurisdiction to pass a decree based on that decision. It is no doubt true that a court cannot confer jurisdiction on itself by the wrong determination of question and in order to reconcile this principle with that ciated by the Privy Council, it may be necessary to ad definition of the term 'jurisdiction' such as that propose roffe in *Sheo Prasad* v. *Ramchunder* [1]. If the definition which he prefers, that based on the presence of local, personal or pecuniary circumstances, or the nature of the subject matter of the suit be adopted, the result would be in accordance with the form of S. 115, since objections to the court's competence to entertain the proceedings or its refusal to entertain them would then be covered by S. 115 (a) and (b) whilst action and refusal to take action after the beginning of the trial which otherwise complied with its requirements would come within (c). It is, however, unnecessary to elaborate the discussion further in this direction since there is in my opinion no ground for treating the establishment of the validity of the notice in the case before us as having any more special character than the other facts essential to a decision on the merits or as a condition precedent to the exercise of jurisdiction. I therefore cannot uphold the learned judge's interference with reference to S. 115 (*a*).

We have also considered it with reference to S. 115 (*c*). But it is clear from the Privy Council decision already referred to that we cannot interfere on the ground of mere mistake in fact or law; and we have been shown nothing else. For it is not suggested that the conduct of the trial in the Small Cause Court was in any respect irregular or illegal.

In these circumstances, the Letters Patent appeal must be allowed, the decision of the learned Judge being set aside and that of the Small Cause Court Judge restored. The defendant will pay the plaintiff's costs throughout.

Sadasiva Aiyar, J.:—There are absolutely no merits in the defendant's case. Taking it that on the construction of the rental agreement the defendant is entitled to be in possession for a erm of not less than 15 years and 6 months, that is, till the 9th December 1912, the present suit was brought in ejectment 1913 and the defendant had notice in October 1911, more

1. (1913) I.L.R. 41 C. 323.

than 15 months before the suit was brought; and the plaintiffs were determined not to allow him to occupy the premises for a day more than the defendant was entitled to do. Even in a case of revision under S. 25 of the Provincial Small Cause Courts Act, the High Court has a discretion to interfere or not and where substantial justice has been done in the Lower Court, it is not advisable to use revisional powers on purely technical grounds. (See *Gopalan Iyengar* v. *Venkatachela Iyengar* [1]). Much less is it advisable to interfere when this court's powers of revision are invoked under S. 115 of the Civil Procedure Code. On the point whether a question of jurisdiction is involved in this case so as to allow of interference under S. 115, it has no doubt been held in *Vuppuluri Atchayya* v. *Seetarama Chandra Rao* [2], that where an appellate Court by reason of error of law decides that the Court of first instance has or has not jurisdiction to entertain a suit *taking the facts alleged* in the plaint as proved, the High Court can interfere under S. 115 with the wrong decision of the Appellate Court. I was the dissentient Judge in that Full Bench case. That decision (I fully admit) is binding upon me notwithstanding that two very learned Judges of the Calcutta High Court in *Shew Prosad* v. *Ramchunder* [3], have taken a view which is almost identical with mine. But all those observations of that very learned Judge (Sundara Aiyar) in his judgment in the above Full Bench case which went beyond the actual conclusion of the Full Bench are *obiter* and not binding. The judgment of the Chief Justice (then Mr. Justice Wallis) in that case confined itself to the point which arose for actual decision.

In the present case the allegation in the plaint being that proper notice to quit has been given to the defendant, the jurisdiction of the Presidency Small Cause Court over the suit was clearly not taken away by any provision of the Common or the Statute Law and the Small Cause Judge did not clutch at jurisdiction through any error of law committed by him. The decision in *Vuppuluri Atchayya* v. *Seetarama Chandra Rao* [2] does not apply therefore to this case and the learned Judge whose decision is appealed against had therefore no jurisdiction to interfere under S. 115 with the judgment of the Small Cause Court.

I agree therefore that this appeal should be allowed.

1. (1912) M. W. N. 1227. 2. (1912) 24 M. L. J. 112.
3. (1913) I.L.R. 41 C. 323.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Mr. Justice Sadasiva Iyer and Mr. Justice Phillips.

Muddusami Siddappa and others ... *Appellant* in S. A. No. 1058 of 1914 (1st Defendant) Appellants in S. A. No. 1059 of 1914 (Defendants)*

v.

Bhaskara Lakshmi Narasappa and another. *Respondents in both (Plaintiffs.)*

Muddusami Siddappa v. Bhaskara Lakshmi Narasappa.

Hindu law—Widow—Alienation by—Debts of husband, existence of—Imprudent transaction—Absence of good faith—Right of alienee to improvements.

Where a Hindu widow sells immoveable properties of her husband for a low price for debts incurred by her husband on a mortgage of those properties which are being gradually wiped out from the usufruct, and the widow's real object was to get some ready cash into her hands and the alienees were not ignorant of the widow's real object, the alienation is invalid against the reversioners.

The existence of a debt due by the husband's estate on the date of the sale, does not entitle the widow to sell away a portion of the property, if the sale would be imprudent.

A wholly imprudent alienation made by a widow not with the religious motive of freeing her husband's soul in his after-death-state from the burden of his debts, but with a view to get some ready cash into her hands cannot be supported as against the reversioners.

An alienee under such an alienation, who is not a *bona fide* alienee is not entitled to claim improvements.

Nanjappa Goundan v. *Peruma Goundan* [1] followed.
Kidar Nath v. *Mathu Mal* [2] distinguished.

Second appeals against the decrees of the District Court of North Arcot in A. S. Nos. 424 and 425 of 1913, preferred against the decrees of the Court of the District Munsif of Madanapalli in O. S. Nos. 538 and 539 of 1907.

S. Srinivasa Iyengar and *A. Swaminatha Iyer* for the Appellants.

The sale deeds, Exs. XII, XIII and XIV, shew that the properties were sold for Rs. 1,600. The widow had debts to the extent of Rs. 1,425 to discharge of which about Rs. 1,300 were her husband's debts. So the alienation by the widow is valid and binding upon the reversioner. It is not necessary to show the existence of pressure or necessity. The obligation to pay a husband's debt comes under the head of religious benefit. The

* S. A. Nos. 1058 and 1059 of 1914. 17th August 1915.
1. (1909) I.L.R. 32 M. 530 ; s.c. 19 M.L.J. 454. 2. (1913) I.L.R. 40.C. 555 s.c.

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observations of the Judicial Committee in *Hanooman Pershad's case* as to the duty of the alienee will not apply where the alienation is for the purpose of discharging husband's debt. It is on the same principle that it has been held that a widow could pay the barred debts of her husband, *Govind Godbole* v. *Dondev Godbole* [1], *Kondappa* v. *Subba Rao* [2], *Udaichander Chukerbutty* v. *Ashutosh Das Mogundas* [3], *Bhagwant* v. *Nivrithi* [4]. Mayne in his Hindu Law, 8th Edition, p. 880, para 633, keeps the distinction clear between cases of necessity and religious benefit. The widow is not a trustee of the estate. She fully represents the estate. No pressure or demand is necessary, *Muthukrishna Chetty* v. *Annapurnathachi* [5]. She is fully entitled to the income and need not pay her husband's debts out of the income, *Ramasami Chetti* v. *Mangaikkarasu Nachiar* [6].

On the question of improvements the Privy Council case in *Kidar Nath* v. *Muthu Mal* [7] is decisive. There the alienee was given improvements. See also *Dattaji* v. *Kalba* [8]. The case in *Nanjappa Goundan* v. *Peruma Goundan* [9] is distinguishable. There the purchaser knew that there was no necessity or wilfully abstained from making inquiries.

T. R. Ramachandra Iyer and *S. Gopalaswami Iyengar* for Respondents.

The question as to whether there was necessity for the sales or not is a question of fact. In the present case there is no provision in the document for interest. Nearly half the debt was wiped out by the usufruct. There was no necessity for paying up the debt by an improvident sale. The whole debt would have been discharged in 6 years. Where a widow pays barred debts, there the debt exists though the remedy is barred. So a sale to discharge the debt though barred has been held to be justifiable.

The case in *Muthukrishna Chetty* v. *Annapurnathachi* [5] is distinguishable. There the interest had swollen up to Rs. 300 on the principal amount of Rs. 400. On the question of improvements, the Privy Council in *Kidar Nath* v. *Mathu Mal* [8] did not

1. (1886) I. L. R. 11 B. 320. 2. (1889) I. L. R. 13 Mad. 189.
3. (1893) I. L. R. 21 C. 190. 4. (1914) I. L. R. 39 Bom. 113.
5. (1911) 9 M. L. T. 313. 6. (1894) I. L. R 18 M. 113
7. (1913) I. L. R 40 Cal. 533; s.c. 25 M L. J. 176.
8. (1896) I.L.R. 21 B. 749. 9. (1909) I.L.R 32 M. 530, s.c. 19 M.L.J.

decide the question of whether the alienee was entitled to improvements or not. The only question before the Privy Council was what sum was to be awarded for the improvements. The case in *Nanjappa Goundan* v. *Peruma Goundan* [1] applies. The Privy Council case has been discussed in 27 M.L.J. 137.

A. Swaminatha Iyer in reply. The document provides for interest. The year in which the sales were made was 1876 famine year. So the sales were justifiable. The result of denying the value of improvements would be to deny it to the alienee in all cases. Where the alienation is subsequently found not to be valid. If the alienation is valid no question of improvements arises. The Privy Council in *Kidar Nath* v. *Mathu Mal* [2] would not have awarded improvements if the alienee was not entitled to it.

The Court delivered the following

Judgments:—*Sadasiva Iyer, J.*—The defendants are the appellants in these two connected second appeals. The suit was brought by the reversioners after the death of a Hindu widow for possession of properties improperly alienated by her to the appellants. The alienations are evidenced by the documents, Exhibits XII, XIII and XIV, dated 5th February 1876.

The Lower Appellate Court came to the following findings of fact.

(*a*) Of the Rs. 1,600 the total purchase-money mentioned in these three documents, about Rs. 1,300 went towards the discharge of debts which had been incurred by the last male owner. (See Exhibits I, II Series, IV Series, VII, VIII and XVI.)

(*b*) Rs. 115 was due under a document, Exhibit XI, executed by the widow herself and Rs. 175 was paid in cash.

Out of Rs. 1,300 which went towards the discharge of the husband's debts, Rs. 1,200 was due under two usufructuary mortgage bonds and a conditional sale-deed (see Exhibits I, II and IV) which had been executed for a total principal sum of Rs. 2,100. This sum of Rs. 2,100 had become reduced to Rs. 1,200 owing to the very favourable terms contained in the two usufructuary mortgage deeds, namely, that the usufruct of the land should go wholly in satisfaction of the principal amounts without any liability on the mortgagor's part to pay interest

1. (1909) I.L.R. 32 M. 530. 2. (1913) I. L. R 40 C. 555

unless he obstructed the enjoyment of the lands by the mortgagees.

The Lower Courts found that there was no necessity for selling the lands (which had been mortgaged for a sum of Rs. 1,900) for the low price of Rs. 1,600 in order to discharge debts, which were being gradually wiped out from the usufruct, that the widow's real object was not to discharge her husband's debts but to get some ready cash into her own hands as was shown by her conduct throughout, during the space of about 8 years after her husband's death, (such conduct including the sale even of her husband's dwelling houses) that the defendants could not be treated as *bona fide* alienees, that is, alienees who were ignorant of the widow's real object and that therefore the alienations were invalid against the reversioners. The learned District Judge further disallowed the defendant's claim for compensation for the improvements made by them on the lands sold to them.

I do not think that the appellants are entitled to question in second appeal the finding of fact by both the courts that there was no necessity for the sales made by the widow and that the defendants knew that there was no necessity.

Mr. S. Srinivasa Iyengar, however, argued that there was, what he called, a "technical" necessity for the sales, in other words, that on the finding that there was a debt of Rs. 1,300 due by the husband's estate on the date of the sales, the widow was entitled to sell away a portion of her husband's estate to discharge that debt even though the transaction might have been imprudent. He relied on certain authorities of which I need notice only two, namely, Mayne's Hindu Law, paragraph 633, and the judgment in *Muthukrishnan Chetty* v. *Annapurnathachi* [1]. The passage in Mayne's Hindu Law states that a Hindu widow can validly sell her husband's properties in order to discharge her husband's debts. But I do not think that the learned author intended to lay down that a widow could take advantage of the existence of a few debts to sell away her husband's properties for less than their value in order to get ready money into her own hands and while the debts wer[e] being discharged from the usufruct of the lands mortgaged f[or] those debts. The observation in the case in *Muthukrishn[an] Chetty* v. *Annapurnathachi* [1] that actual demand by a credi[tor]

1. (1911) 9 M. L. T. 313.

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need not be proved to justify a widow in selling her husband's property to discharge his debt, must be read in the light of the facts found in that case, namely, that the debt was carrying interest and the principal amount of Rs. 400 had swollen to a sum of Rs. 700 by the addition of Rs. 300 on account of interest and that "*the widow acted prudently in taking steps to discharge the debt.*" I do not think that the authorities quoted can support the alienation made by the widow in this case, namely, a wholly imprudent alienation made about 10 years after the husband's death, not with the religious motive of freeing her husband's soul in his after-death state from the burden of his debts, but with a view to get some ready cash into her own hands, the mortgage creditors having no right to sue for their moneys. Mr. Mayne, in the same paragraph, 633, relied on by the appellant's learned vakil, says that the widow's right to pay debts by alienating the properties must be exercised *bona fide* in discharge of the duty to pay her husband's debt and that when she enters into transactions with the improper motive of even preferring one creditor over another, that creditor would not be entitled to profit by such fraud. On the findings of fact in this case, therefore, it seems to me, that the lower courts were justified in treating the alienations void as against the reversioners.

The last question to be considered relates to the appellant's right to claim improvements. The case in *Nanjappa Goundan* v. *Peruma Goundan* [1] clearly negatives the defendant's right to claim the value of improvements. Reliance was, however, placed on the Privy Council decision in *Kidar Nath* v. *Mathu Mal* [2] for the contention that if the market value of the alienated properties had been raised by the improvements made by the alienees, they were entitled to claim the cost of the improvements not exceeding such increase in the market value. Their Lordships of the Privy Council had not in that case to deal with the question whether the alienees in that case were *bona fide* alienees who, within the meaning of section 51 of the Transfer Property Act, really believed, in good faith, that they were absolutely entitled to the property. The appeal to their Lordships was made by the alienee who claimed more compensation than the Indian Courts had given him and their

1. (1909) I.L.R. 32 M. 530. 2. (1913) I.L.R. 40 C. 555; s.c. 25 M.L.J. 176 (P.C.)

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Lordships without calling upon the respondents dismissed the appeal on the ground that the appellant had not been given less than he was entitled to claim. That case is therefore no authority for the proposition that the person who could not have believed in good faith that he was absolutely entitled to the property, can claim the value of the improvements effected by him.

In the result I would dismiss the second appeal with costs.

Phillips, J.—I concur.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Mr. Justice Spencer and Mr. Justice Coutts Trotter.

Ayyaperumal Odaiyan (died) and others. *Appellants* (Defendants).*

v.

S. R. M. A. R. Ramasami Chettiar. *Respondent (Plaintiff in all 2nd Appeals).*

Ayyaperumal Odaiyan v. S. Ramasami Chettiar.

Estates Land Act, Ss 27, 28—Rebuttable presumption—Payment of varying rates in money—Original waram—No permanent substitution of money system—Reversion to waram—Propriety of.

Where for a number of years, the tenants were paying in money but there was no binding permanent arrangement substituting payment in money for the original waram system.

Held, that if the landlord did not agree to the preceding year's rates, the court was bound to declare waram as the proper mode of payment.

Held, also that Ss. 27 and 28 of the Estates Land Act only raise a presumption that the same rent is payable as was paid in the preceding year but this presumption may be rebutted.

An *ex-parte* decision in a suit for rent fixing the rent for the year which expressly left open the question whether the landlord was not entitled to claim waram, would not preclude the raising of that question in subsequent years.

Held, that Gudipakattu was only a provisional arrangement and did not preclude reversion to waram.

Second appeals respectively against the decrees of the District Court of Tanjore in A. S. Nos. 177, 641, to 668, 670, to 674, 681, to 689, 691, 693, to 699, 701, 702, 705, 706, 708, 709, 711, 7 3, 7 7, 720, 723, 725, 726, 728, to 731, 174, 385 and 455 of 1911 respectively preferred against the decree of the Court of th Deputy Collector of Pattukottah Division in S. S. Nos. 720, 70 to 719, 721, to 725, 727, 728, 730, to 734, 741, to 747, 750, 75

* S. A. Nos. 1870 to 1986 & 2239 to 2241 of 1912. 30th March 1915.

753, 755, to 764, 767, 768, 770, 771, 773, 775, 779, 782, 785, 787, 788, 790, to 793, 504, 419, and 497 of 1909. Ayyaperum Odaiya v. Ramasa Chettia

T. Rangachariar for Appellants.

T. R. Ramachandra Aiyar and *G. S. Ramachandra Aiyar* for Respondents. Spencer, J.

The Court delivered the following

Judgments :— *Spencer, J.*—These and other connected suits were brought under the provisions of S. 56 of the Madras Estates Land Act, 1908, by a landholder to compel his ryots to accept the pattas tendered to them for fasli 1318. In such suits it is the duty of the Revenue Court under S. 57 of the Act to determine what is a proper pattah. The proprietor claimed that a usage existed in this village to collect rents according to the amani system; in other words, that the ryots should give rents in "Waram" which implies a division of the crop between the landholders and the ryot. (*Vide* S. 29 of the Madras Estates Land Act, 1908). To this the ryots rejoined that by a longstanding custom they had been paying fixed money rents and they denied the usage set up by the plaintiff to pay rents in kind. The question thus arose whether money rents or waram rents were the rents established by agreement or custom in this village.

The Deputy Collector who tried these suits found that the plaintiff had not proved that the rents contended for by him were the rents lawfully payable. He also found that the rents contended for by the defendants had not been proved to be the fixed money rents lawfully payable.

He then proceeded to discuss the plaintiff's contention that he had a right to revert to the amani system in the light of Act I of 1908 which he considered to have altered the law as laid down in S. 11 of the Madras Rent Recovery Act (Act VIII of 1865). This section provided that, if either party were dissatisfied with the rates determined by the Collector according to local usage or to rates, paid for neighbouring lands, he might claim to have the rent discharged in kind according to the waram: There is no similar provision in the Madras Estates Land Act (Act I of 1908); but S. 27 of that Act declares that "If a question arises as to the amount of rent payable by a ryot, or the conditions under which he holds in any revenue year, he shall be presumed, until the contrary is shown, to hold at the same rate, and under the same conditions as in the last preceding revenue year;" and the next

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section creates a presumption that the rent payable for the time being is fair and equitable, until the contrary is proved. Finally, the Deputy Collector decided that the proper rents payable for fasli 1318 should be those decreed in the plaintiff's suit to recover rent for fasli 1317.

The District Judge on appeal agreed with the Deputy Collector's findings of fact except as to the date up to which the amani system prevailed. In his opinion, there was evidence that it prevailed up to the year 1871, whereas the Deputy Collector found that it was not in force subsequent to 1868.

There are five periods of management to be considered in the history of the Sillathur Zemindari. The first is the period between 1855 and 1867 when the Estate was under the management of Rani Ammal, the second is the period between 1868 to 1870 when the Court of Wards were in charge and the third is the period between 1871 to 1900 when Rangasami Pannikondar was the Zamindar. During the fourth period of 1900 to 1905, the ownership of the estate was in litigation and a receiver appointed by the Sub-Court was managing it. The fifth and last period dates from 1905 when the present plaintiff came into possession by purchase.

Whether the amani system lasted till 1867 or till 1870 is not of much consequence, so far as the date is concerned. The important matter is whether the payments of rent in money which the tenants made from time to time were really payments in lieu of waram, and whether that system had been entirely abandoned by the parties, or was in reality underlying all their relationships up to the date of suit.

The District Judge held that the arrangement to pay money rents was a purely temporary one liable to be given up at any time if the Zamindar preferred to go to the trouble of collecting his waram. This is a finding of fact which is binding on this Court in second appeal. Moreover, the observation of the District Judge that the rent payable under the periodical settlement called *Gudupattukkattu* was a provisional arrangement appears to be sound. It is supported by the derivation of the word, and it has been shown that the payments varied according to the crop grown on the land, as disclosed by the evidence of defendant's witness No. 12 who says, "every 4 or 5 years, the land is classified; the lower class being taken into the higher class and

creased rentals levied. The higher class lands are never altered into the lower class." Defendants' witness No. 3 admitted that *Gudupattukattu* villages were those in which money rent was paid for a definite period *in lieu of the waram* due and exhibit O shows that Kottakadu was a *Gudupattukattu village.* Even the Deputy Collector found that the money rents payable were not fixed rents.

The District Judge also held that the Deputy Collector was wrong in basing his decision on the result of the suit for recovery of rent for fasli 1317 ; and in this I think that the District Judge was clearly right. The ryots were *ex parte* in that suit; and there was no adjudication on the question what was a proper pattah ; and in the plaint, the plaintiff reserved his right to have the question whether he was entitled to collect waram determined in separate proceedings.

During the period under the Court of Wards management (Faslis 1278 to 1280 corresponding to 1868 to 1870), the District Judge thinks that amani system prevailed. He bases his decision on certain documents, Exhibit W, GG, series and B. An objection has been taken that Exhibit GG-13 to which he refers does not relate to the village of Kottakadu with which these appeals are concerned. From the appellants' 10th ground of appeal, it appears that the appellants took no objection to the admissibility of Exhibits GG-13 but endeavoured to explain its effect away. But assuming that the District Judge was guilty of a clerical error in referring to this particular Exhibit which is of the year 1869 as a lease of 1868, he would not have been wrong if he had referred to Exhibit GG-3 which relates to 1868. From the extent given in this document it is probable that Kottakadu lands were included. Even if this were not the case, the document would be relevant as evidence of usage prevalent in the neighbouring parent village, and it contains similar terms to those in Exhibits GG-13.

It has also been urged that the last clause of the Exhibits of this series which permits the landholder to appropriate the produce of the ijara lands towards the ijara arrears in accordance with the amani rules is only a reproduction of the landholder's right to attach the crops of his tenants for default of payment of rent, as provided in S. 14 of the Act of 1865. But this does not

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seem to be so. There was no need to mention the amani rules in this connection.

It is further argued that the District Judge has misconstrued Exhibit W and that he was wrong in admitting Exhibit B as evidence that the waram rates prevailed in this period and the preceding period. Exhibit B, is a *takeed* of 1869 which clearly refers to the difficulty in effecting a division of waram in the parent village of Venkarai. As regards Exhibit W, it relates to fasli 1277 and to this village of Kottakadu and it contains an estimate of the gross outturn of the crops in the holdings of different ryots; and although stress is now laid on the absence of evidence to prove for what purpose this document was prepared, the defendants' vakil admitted in the Lower Appellate Court that he could not suggest any other purpose besides a division of produce. The genuineness of this document is not in dispute.

In the end, the District Judge, as there was no reliable oral evidence as to the correct waram rates, adopted the paimash waram rates. It does not lie in the mouth of the defendants who contended in the District Court that, if any waram rates were to be taken, paimash rates were the correct rates, to say that the District Judge was wrong in so doing. They also conceded at the hearing of the suits that the amani system prevailed at the time of the paimash (1829-1830).

The real contention between the parties was on the question whether money rents or grain rents were payable; and on this point the District Judge's finding being one of fact is final, unless it can be shown that it is vitiated by an error in law or by there being no evidence to support his conclusion. In this case his findings are not based merely on the construction of documents.

It is next contended that the Lower Appellate Court was wrong in introducing into these suits, which were tried under the provisions of the Madras Estates Land Act, a provision whereby either party dissatisfied with the rates determined according to the local usage was at liberty under the former Act to revert to the waram rates, and it is urged that the District Judge has wrongly applied S. 26 (3). of the Madras Estates Land Act, the provisions of which are prospective. This section merely provides that, if a landholder grants a lease of land at a rate lower than the lawful rate payable before the grant, his successor shall

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be bound to adopt the same concession. In this respect, it is merely a repetition of the provisions of S. 11, clause 4 of the Act of 1865, that no pattahs which have been granted by any landholder at rates lower than the rates payable upon such lands or upon neighbouring lands of similar quality and description shall be binding upon his successor, unless *bona fide* granted for the purpose of making permanent improvements, and unless the tenant shall have conformed to the conditions upon which such lower rates were allowed. This has been the law both before and after the passing of Act I of 1908. I do not think that the District Judge meant to base the landholder's right to have waram rates of rent upon this provision only. He found in his judgment that there was no permanent arrangement to pay money rents ; and the only alternative, therefore, was to go back to the waram system and this is all that his decision amounts to.

Mr. T. Rangachariar has pressed on our attention that no foundation was laid for the District Judge's assumption that the rates prevailing in these years were low rates. Whether they were high rates or low rates, either party was at liberty to revert to their original contract or usage if it has been shown to have been merely in abeyance during the years when the rents payable from year to year were uncertain and when temporary arrangements prevailed.

If the District Judge had allowed the plaintiff to exercise this option because it was the law laid down by S. 11 of Act VIII of 1865, he would have been wrong in making the repealed Act the ground of his decision, but he would have been right in principle under the circumstances of this case, because if there is a fundamental agreement between parties it should be upheld in spite of temporary lapses sanctioned by mutual consent. This was the principle under which *Oliver* v. *Markanda Aiyar* [1], was decided, and in that case 70 years of agreement to pay money rents for limited periods was not considered to give rise to a necessary implication of a contract to adopt money rents for ever. A similar view was taken by the Calcutta High Court in *Sohobut Ali* v. *Abdool Ali* [2]. The period of transition in these suits was only about 40 years.

Mr. T. Rangachariar wished to make out a refusal on the part of the District Judge to apply Ss. 27 and 28 of the Madras

1. (1893) 3 M. L. J. 263. 2. (1898) 3 C. W. N. 151.

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Estates' Land Act to the circumstances of this case. These sections only provide that a presumption will arise that a ryot is bound to pay rent at the same rate as he paid in the preceding revenue year, *until the contrary is shown.* When it has been shown, as in this case, that the rent paid in the preceding revenue year was fixed by an *ex parte* decision in which all the points upon which the parties were at variance were left open, and when there is a finding of fact that up to the present date there has been no contract between the landholder and the ryot to pay a fixed money rent, this is equivalent to showing the contrary of the presumption referred to in those sections. (*Vide Maharani Beni Preshad* v. *Raj Kumar* [1], as to the value to be attached to the prior decision).

If the ryots are still dissatisfied with the waram rates fixed in these suits, they have always a remedy provided in S. 40 of the Madras Estates Land Act of suing before the Collector to have their rents commuted into definite money rents. But the present suits have not been contested in such a way as to permit the equivalent of the waram rates being now determined in money. For this purpose, it would be necessary to have evidence as to the prices prevailing in the preceding ten years. We dismiss the second appeal with costs.

The memos of objections are not pressed and are dismissed.

Coutts Trotter J. :—As this is a matter of some little difficulty and doubtless one of great importance to the parties, I think it right to add my own reasons for our decision. There were a very large number of suits; a great quantity of documents was produced, numerous witnesses were examined, and many points were discussed in the Lower Courts. The advocates are to be commended for having focussed the attention of this Court upon a single point, illustrated by only a few of the many documents exhibited.

These suits arose between the proprietor of the Sillathur Zamindari and his ryots in the village of Kottakadu in the Taluk of Pattukottai. They were brought by the landlord to compel the ryots to receive pattahs and execute muchilikas in respect of their holdings, in accordance with the provisions of chapter IV of the Madras Estates Land Act, No. I of 1908. The sole issue which we have to try is this; the landlord contends that his ryot

1. (1902) 16 C. L. J. 121.

must accept pattahs on the amani system whereby the rent consists of a fixed portion of their produce; the tenants contend that they are entitled to be assessed at a money rate of rent, and that therefore the pattahs tendered are bad. In the view I take of the case, it is not necessary to decide the further question as to what that money rate should be.

The Act is neither very clear nor very well arranged; but I think the language of S. 59 illustrates the issue which the courts below had to determine. That section provides that rent shall be payable in instalments according to agreement or in the absence of agreement according to established usage; and on that analogy I think the ryot must accept a pattah the general conditions of which conform to such agreement or usage. S. 27 raises a presumption that a ryot holds under the same conditions as in the previous revenue year; but that presumption would be rebutted by showing that those conditions were not in accordance with the agreement or usage prevailing between the parties. It is obvious that the matters to be determined in the suits are ultimately questions of fact; and the determination of the Lower Court can only be challenged in one of three ways. There may be no evidence to support the findings; or the learned judge may have misdirected himself in law in the process of arriving at those findings; or it may be said that his findings of fact, while not open to such objections, do not warrant the conclusion which he has drawn from them. It is in this last way that the appellant's case has been framed; and it therefore becomes necessary to examine the judgment, and see exactly what it is that the learned Judge has found.

After a careful review of the somewhat troubled history of the Zemindari in the light of such materials as were available to him, the learned Judge comes to the following conclusions:

1. That up to the year 1871, the amani system prevailed in full force, and the rent consisted of a definite percentage of the produce.

2. That after that time the ryots succeeded in making the successive Zamindars agree to take money and not produce as rent.

3. That the amount of such money-payments was not fixed and for all, but was altered every few years on the initiative

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of the Zemindar, and was always altered in the direction of enhancement.

4. That every such alteration was preceded by an inspection of the lands and an estimate of their productivity.

Now so far as we have pure findings of fact and nothing more, they are amply supported by the evidence, and no serious attempt has been made to challenge them. From them the learned Judge has proceeded to draw these further conclusions; that the money payments from 1871 onwards were varied in accordance with the amount of the produce and must be regarded as being made under the amani system, inasmuch as the essence of that system consists in taking from the ryot a contribution varying with the amount of produce; that the fact that the actual physical commodity taken was money and not grain was a mere matter of convenience to the parties; and that pattahs providing for payment of a fixed proportion of the produce must therefore be accepted by the ryots. For the ryots it is argued that though there may have been no fixed money rent, it is clearly proved that rent has been paid in money for the last 35 years; and that accordingly to give validity to a pattah on the amani system, would be to disregard the outstanding feature of the usage obtaining between the parties. They further say that it is mere surmise to hold that the variation of the money rents paid was based on the proportion in force in the period before 1871; and that the estimates made of the productivity of the land may have been made for other purposes than the fixing of the rent. Mr. T. Rangachariar was of course faced with this difficulty; that when it came to fixing the amount of rent payable, the pattah would either have to be silent, or to prescribe such rent as the Zamindar should choose or be able to exact. To avoid such an absurdity he points to Ss. 27 and 28 of the Act, and puts his case in this way: the evidence shows that a money rent was paid; its amount varied no doubt from time to time, but its variation was determined either at haphazard or by factors no longer ascertainable; and accordingly the presumption should take effect that the sun paid in the last revenue year was the proper one to enforce.

I do not think that this contention is sound. Mr. Rangachari was quite unable to suggest any purpose for which the ascerta ment of the produce would be necessary or useful, other than one of fixing the rent. Rebuttable presumptions are guide

the ascertainment of the fact; it is an abuse of their true function to convert them into an excuse for evading that ascertainment. I think there was material on which it was open to the Judge to find that the payment in money from 1871 to 1909 was a mere incident which did not affect the principle upon which the payment was made, and that the tenure remained throughout an amani tenure. He has so found, in my opinion, not by way of mere surmise or conjecture, but upon a reasonable resolution of the probabilities of the case. That being so, we cannot disturb his conclusion, even if we would have arrived at a different conclusion had we been in his place. I think the learned Judge was mistaken in seeking to apply S. 26 (3) which, in my opinion, has nothing whatever to do with this case; but that mis-conception in no way affects or vitiates his essential findings. The second appeals fail and must be dismissed with costs.

Ayyaperumal Odaiyan v. Ramasami Chettiar.

Coutts Trotter, J.

PRIVY COUNCIL.

Present:—Viscount Haldane, Lord Shaw, Sir John Edge and Mr. Ameer Ali.

[On appeal from the High Court at Calcutta.]

Thakurani Tara Kumari ... *Appellant.**

v.

Chaturbhuj Narayan Singh and others ... *Respondents.*

and

Maharaja Sir Ravaneswar Prasad Singh Bahadur.. *Appellant.*

v.

Chaturbhuj Narayan Singh and others ... *Respondents.*

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Thakurani Tara Kumari v. Chaturbhuj Narayan Singh.

Hindu Law—Mitakshara—Inheritance—Impartible Estate—Division between brothers—No division of the impartible estate—Widow's right to inherit notwithstanding—Custom—General law, applicability of, where not superseded.

There is no inconsistency between impartibility and the right of females to inherit and the widow of the last holder of an impartible estate is entitled to succeed if her husband was in fact separated and died without male issue unless a custom to exclude her from succession is proved.

Where a custom is proved to exist, it supersedes the general law which however still regulates all outside the custom.

It is not correct to say that there could be no complete separation without the ancestral impartible estate held by one of the members also being divided. The other members have no coparcenary rights in the impartible estate and their contingent interest under the custom is liable to be defeated by an alienation of estate by the holder for the time being even if the family remains joint and

* 13th July 1915.

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when the family ceases to be joint the ordinary law of the Mitakshara gives the widow an estate in priority to the contingent interest of the other members under the custom.

Where the holder of an impartible estate dissatisfied with the conduct of his undivided brother granted him a mokurari patta of a portion of the estate for the maintenance of himself and his descendants and the latter built a separate house for himself though adjoining the family residence and was separate in mess and worship and defraying the expenses of the marriages, etc., of his descendants himself.

Held, that the brothers were divided in status and the widow was entitled to succeed in preference to the brother and his descendants.

Neelkisto Deb Burmono v. *Beerchunder Thakoor* [1], and *Ram Nundun Singh* v. *Maharani Janki Koer* [2], approved.

Consolidated appeals from a judgment and decree of the High Court of Fort William in Bengal, dated 9th January 1910, reversing the judgment and decree of the Court of the Subordinate Judge of Monghyr, dated 22nd January 1909.

THAKUR BHAIRO NARAIN SINGH.

Thakur Ranjit Narain Singh. — Bhupat Narain Singh.

Thakur Ram Narain Singh, widow —Thakurani Tara Kumari. — Chaturbhuj Narain Singh.

Bandhu. Charku. Nanku. L.

The taluk of Telwa, an impartible estate, succession to which was governed by the rule of primogeniture, descended on Bhairo Narayan Singh, who died in 1863 leaving two sons, Ranjit and Bhupat. The family was a joint and undivided one, governed by the Mitakshara School of Hindu Law, but the succession to the estate was regulated by a custom of the family according to which the eldest son of the last holder succeeded to the gadi as sole owner; his other sons being entitled to receive Khorposh or maintenance. Ranjit accordingly succeeded to the gadi and Bhupat received maintenance. In 1879 Ranjit executed a mokurari potta in favour of his brother Bhupat whereby he assigned to him two mouzahs and four bighas of Kamat land in another mouzah as a Khorposh grant for his maintenance. By the terms of the sai mokarari, it was not alienable by the grantee, but in breach there Bhupat did in fact execute mortgages from time to time to recei money for his needs. In 1897 Ranjit died leaving a wi

1. (1868) 12 M. I. A. 523.

2. L. R. 29 I. A. 178.

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Gyan Kumari and an infant son, Ram Narain, him surviving. She was appointed guardian of her minor son who succeeded to the gadi as Thakur according to the custom. In 1902 Bhupat Narain died leaving a son, Chaturbhuj Narain, who had four sons, all of whom were respondents. In 1903 Ram Narain died while still a minor, leaving no issue, but only a widow, Tara Kumari. All the Revenue Courts refused to admit her claim and entered Chaturbhuj's name in the revenue registers as heir to the estate. In order to pay off the debts incurred by Ranjit Narain, Tara Kummari sold a half share of taluk Telwa to Maharaja Ravaneshwar Singh for Rs. 50,000, on September 16, 1906. The Maharaja paid off the debts. On August 19, 1907, Tara Kumari and the Maharaja instituted the suits against the respondents for the recovery of the estate from the respondents. The Subordinate Judge decided in favour of the appellants, but on appeal to the High Court, the judgment of the lower court was reversed and her and the Maharaja's claims were disallowed. They therefore obtained certificate to appeal to His Majesty in Council in due course and subsequently both appeals were consolidated.

Sir Robert Finlay, K. C., (with him *Lowndes*) for the appellants contended that the Subordinate Judge had held on facts that Bhupat and Ranjit had separated in food and estate. Bhupat had built a house separate from the family house, had a different Thakurbari, Tulsi Pinda and had removed his family from the family house. He had built a wall separating both houses and borrowed money for the marriage of his grand-daughter. He had further deposed in a criminal case that he was separate. The judgment of the Subordinate Judge was right and should be upheld. The defence was a series of denials. They had not proved that by custom a female was excluded from succession. The estate was never joint. It went by custom of primogeniture. This custom was inconsistent with the property being joint. What the opposite party said was that inasmuch as property was impartible, here could be no partition.

[*Mr. Ameer Ali.*—Does not the *Shivaganga case* [1], cover point you argue ?]

In *Tekait Durga Prasad Singh* v. *Durga Koer*[2], it was held that the fact of an estate being impartible, it did not follow as a

(1863) 9 M. I. A. 543. 2. (1873) 20 W. R. 154.

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necessary consequence that no division or separation could be effected with respect to it, and that an ancestral impartible estate might be held separately after separation from other members of the family.

Reference was made to

Chintamun Singh v. *Nowlukho Konwari* [1]. *Bijoy Bahadur Singh* v. *Bhupendra Bahadur Singh* [2]. *Jogendra* v. *Nityanand* [3], *Kali Krishna* v. *Raghunath Deb* [4], *Raja Rup Singh* v. *Rani Baisni* [5], *Raja Rup Singh* v. *Rani Bansi* [6], *Ram Nandun Singh* v. *Maharani Janki Koer* [7].

De Gruyther, K. C., and *Dunne* for the respondents contended that the presumption of law was that the family was joint.

Sir Robert Finlay.—The estate has never been joint. It goes by custom of primogeniture. The custom was inconsistent with the property being joint.

There could be no partition when the estate was impartible, and the question was how far the ordinary rule of succession was modified. Appellants had to establish that separation had taken place. The onus rested on them and they had to prove when the estate became separate. The impartible estate could devolve according to custom. Food and worship were immaterial.

The property given to Bhupat was only for maintenance and not by way of partition. The mokurari was not an alienation in this case. The plaint did not say that there was anything in the nature of separation.

Lord Haldane.—It is one of the cases in which one has to determine whether there was any partition with reference to the circumstances.

It would be extraordinary if he were to treat himself as a separate entity.

Lord Haldane.—The only question is whether they cam to an arrangement for partition which is a question of circum

1. (1875) I. L. R. 1 Cal. 153., s.c. L. R. 2 I. A. 260.
2. (1897) I. L. R. 19 A. 160.
3. (1890) I. L. R. 18 Cal. 151.
4. (1903) I. L. R. 31 Cal. 224.
5. (1884) I. L. R. 7. All. 1.
6. (1884) L. R. 11 I. A. 149.
7. (1902) L. R. 29 I. A. 178

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stancial evidence. If you grant separation of some kind, separation of worship, food, etc., the presumption is that separation had taken place.

There was no co-parcenary between the eldest and junior members of a raj family having impartible estate. One might have a thakurbari of his own if he were to live away from the family house. If partition had taken place and it was recorded in Government papers that there was a complete partition of all the estates except one, the succession to those who formed a joint family was by survivorship.

Reference was made to

Laliteshwar Singh v. *Rameshwar Singh* [1], *Pittapur Case* [2], *Chintaman Singh* v. *Nowlekka Kunwari* [3], Mayne on Hindu Law, S. 495.

The judgment of their Lordships was delivered by

Sir John Edge.—These are consolidated appeals. That in which Thakurani Tara Kumari is the appellant has arisen in a suit which was brought by her on the 19th August 1907 in the Court of the Subordinate Judge of Monghyr against Chaturbhuj Narayan Singh and his minor sons. In that suit Maharajah Sir Ravaneswar Pershad Singh was a *pro forma* defendant. The other appeal, in which Maharaja Sir Ravaneswar Pershad Singh is the appellant, has arisen in a suit which was brought by him on the 19th August 1907 in the Court of the Subordinate Judge of Monghyr against Chaturbhuj Narayan Singh and his minor sons. In the latter suit Thakurani Tara Kumari and others were *pro forma* defendants. In each suit the Subordinate Judge made a decree in favour of the plaintiff in the suit. From each decree Chaturbhuj Narayan Singh and his minor sons appealed to the High Court of Judicature at Fort William in Bengal, which, by its decree in each appeal, reversed the decree to which the appeal related and dismissed the suit. From those decrees of the High Court these consolidated appeals have been brought.

The Thakurani is the widow of Thakur Ram Narayan Singh, who was a son of Thakur Ranjit Narayan Singh, who was the elder of the two sons of Thakur Bhairo Narayan Singh. Chaturbhuj Narayan Singh was the son of Bhupat Narayan Singh, who

1. (1909) I. L. R. 36 C. 481. 2. (1898) I.L.R. 22 M. 383.
3. (1875) L. R. 2 I. A. 263.

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was the younger son of Thakur Bhairo Narayan Singh. Thakur Ram Narayan Singh died without issue male. The immovable property to which the suits relate is known as Taluka Telwa, otherwise the Telwa Gadi, in the District of Monghyr. Taluka Telwa is an ancestral impartible estate which, in his lifetime, was held as his estate by Thakur Ram Narayan Singh, and had previously been held by his father Thakur Ranjit Narayan Singh, and before him by his father Thakur Bhairo Narayan Singh. By the kulachar or family custom Taluka Telwa descends by the rule of primogeniture. The appellants allege that Thakur Ranjit Narayan Singh, on the 14th September 1879, granted to his brother Bhupat Narayan Singh a mokurari pottah (perpetual lease) of a part of Taluka Telwa for the maintenance of Bhupat Narayan Singh and his descendants, and that Thakur Ranjit Narayan Singh and his brother Bhupat Narayan Singh separated and ceased to constitute a joint Hindu family; except in so far as the family custom applies, the law of the Mitakshara governed Thakur Bhairo Narayan Singh and his descendants. The Thakurani claims that she, as the widow of Thakur Ram Narayan Singh, who left no issue, succeeded to the estate on his death for a Hindu widow's interest. It is proved that after her husband's death she, in order to discharge debts which had been contracted by Thakur Ranjit Narayan Singh, sold a moiety of Taluka Telwa to the Maharaja. In her suit the Thakurani claimed possession of one moiety of Taluka Telwa, as the widow of Thakur Ram Narayan Singh. The Maharaja in his suit claimed possession of the other moiety of Taluka Telwa as the vendee from the Thakurani. Chaturbhuj Narayan Singh is in possession, and he and his minor sons deny that Thakur Ranjit Narayan Singh and Bhupat Narayan Singh separated.

The written statement of Chaturbhuj Narayan Singh in the suit of the Thakurani is not before this Board, but his written statement in the suit of the Maharaja is, having regard to the evidence and to the findings of the Courts below, instructive. In his written statement in the Maharaja's suit Chaturbhuj Narayan Singh alleged:—

"1. That the said family is governed by the Benares School of Hindu La "save and except that according to family custom the said ancestral zaminda "descends according to the rule of primogeniture on the eldest male member "the eldest line and the junior members are entitled to maintenance and t "females are in no way entitled to succeed to the said zamindari. The ju

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" members even after Khorposh or maintenance grants are made to them out of " the joint property, are entitled to obtain the expenses of marriage, sradh and " other similar ceremonies and all other necessary expenses from the income of the " said property in the hands of the holder of the said estate for the time being.

" 5. That with reference to paragraph 3 this defendant states that Thakur " Ranjit Narayan Singh succeeded to the said estate on the death of his father in " accordance with the family custom aforesaid and that the mokurari settlement " referred to in the said paragraph was also made in accordance with the said cus- " tom and not otherwise. This defendant craves leave to refer to the original of " the said mokurari deed for the terms thereof. This defendant wholly denies that " either before or after the said mokurari settlement Bhupat Narayan Singh " became separate from the said Ranjit Narayan Singh or that he was at any time " separate in food, worship or estate from the said Ranjit Narayan Singh or that " he lived in a house separately built This defendant asserts that he and his " father the said Bhupat Narayan Singh during his life time were joint in food, " worship and estate with the said Ranjit Narayan Singh and after his death with " Thakur Ram Narayan Singh and that they never ceased to reside in the family " dwelling house. This defendant continued joint in food, worship and estate with " the said Thakur Ram Narayan Singh until the latter's death and thereafter " with the defendant No. 6, until shortly before the commencement of the registra- " tion proceedings when disputes and disagreements arose. The allegations to the " contrary in paragraph 3 of the plaint are wholly false.

" 6. That assuming, though by no means admitting, that Bhupat Narayan " Singh and this defendant became separate from Thakur Ranjit Singh in the year " 1287 F. S. and since then he and this defendant were separate in mess and " business and lived in a separate house, as has been falsely alleged in the plaint, " this defendant submits that nevertheless the impartible estate, taluka Telwa con- " tinued to remain joint family property as before, as it never was nor could be the " subject of partition and the defendant No. 1 therefore became solely entitled to " it under the family custom on the death of Thakur Ram Narayan Singh in " preference to his widow."

The "defendant No. 1" mentioned in the written statement is Chaturbhuj Narayan Singh, and the "defendant No. 6" is the Thakurani, who, as has been already stated, was a *pro forma* defendant in the suit of the Maharaja. So far as is now material, the defence of Chaturbhuj Narayan Singh, as disclosed by his written statement, was that females were by the family custom excluded from the succession to the impartible estate and that the joint family had not separated.

No custom excluding the widow of a sonless and separated holder of the impartible estate of taluka Telwa from the succes- sion to the estate for a Hindu widow's interest has been proved, nd it is well decided law that the widow of the last holder of an npartible estate which descends by the rule of primogeniture is ɔt excluded from the succession if her husband was in fact ɔarated and died without issue male, and if no custom which ıld exclude her from the succession is proved. It was held

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by this Board in *Neelkisto Deb Burmono* v. *Beerchunder Thakoor* [1] that where a custom is proved to exist it supersedes the general law, which, however, still regulates all outside the custom. In *Ram Nundun Singh* v. *Maharani Janki Koer* [2] this Board held that :—

"There is no inconsistency between a custom of impartibility and the right of "females to inherit, as may be illustrated by the well-known *Shivagunga* Case, and "therefore general law must prevail unless it be proved that the custom extends "to the exclusion of females".

Consequently the only issue in these suits which is now material is one of fact, namely, the issue as to whether Thakur Ranjit Narayan Singh and Bhupat Narayan Singh separated.

The Subordinate Judge came to the conclusion that Thakur Ranjit Narayan Singh, being displeased with his brother Bhupat Narayan Singh because the latter kept women, separated from him. It was found as a fact by the Subordinate Judge that Bhupat Narayan Singh built a pucca house about a *tussi* (120 feet) to the westward of the family house, established a *Tulsi Pinda* there, and removed his family to his pucca house and lived there separately from Thakur Ranjit Narayan Singh. As a fact Thakur Bhupat Narayan Singh built a wall between his pucca house and the family house of Thakur Ranjit Narayan Singh and established a separate Thakurbari in his house. The houses were quite separate houses, as was found by the Subordinate Judge on the evidence.

A daughter of Chaturbhuj Narayan Singh was married after Thakur Ranjit Narayan Singh had in 1879 granted the mokurari pottah to Bhupat Narayan Singh. Chaturbhuj Nayaran Singh attempted to prove that Thakur Ranjit Narayan Singh defrayed the expenses of that marriage. The Subordinate Judge, however, found on incontestable evidence that the expenses of the marriage were defrayed by Bhupat Narayan Singh and not by Thakur Ranjit Narayan Singh. As a matter of fact, Bhupat Narayan Singh borrowed Rs. 689-2-6 for the expenses of that marriage, and on the 27th June 1897 gave to Shir Lal Modi and Amir Modi a mortgage of lands which he held under the mokurari pottah to secure the repayment to them of, amongst other moneys, that sum of Rs. 689-2-6, which was stated in the mortgage deed t[o] have been borrowed by him from them "for performing t[he] "marriage of my own granddaughter, *i.e.*, the daughter of m[y] "son, Baba Chaturbhuj Narayan Singh."

1. (1869) 12 M. I. A. 513. 2. (1902) L.R. 29 I. A. 178.

On the 27th April 1905 Chaturbhuj Narain Singh, on his examination in a criminal case which apparently related to the removal of some timber, stated, " I am separate from the Thakur of Telwa."

On a careful review of all the evidence the Subordinate Judge came to the conclusion that Bhupat Narayan Singh and his son Chaturbhuj Narayan Singh were separate from Thakur Ranjit Narayan Singh and his son Thakur Ram Narayan Singh.

The learned Judges of the High Court whilst accepting as correct the findings of facts of the Subordinate Judge on which he had come to the conclusion that there had been a complete separation between Thakur Ranjit Narayan Singh and his brother Bhupat Narayan Singh, came to the conclusion that it was not proved that there was a separation in intention and in fact. As it is difficult to understand the reasoning of the learned Judges of the High Court it is better to give the following extracts from their joint judgment. They say :—

" It is the case common to both sides that Bhupat Narain was a man of " licentious habits and that he made himself a nuisance to his brother Ranjit " Narain and created a scandal by introducing his mistresses into the family " dwelling house. It was in consequence of this that Ranjit Narain executed the " maintenance grant in his favour in 1287 to enable him to start a separate " establishment. There can be no doubt that, after receipt of the grant, Bhupat " Narain built himself a new house outside the old family dwelling and that " in course of time a Thakurbari and a Tulsi Pinda were established in that house " and that a wall of separation between his house and the family house was " constructed. It seems to be also beyond doubt that after receipt of the grant " Bhupat Narain raised money by mortgages on the property leased to him and " spent it on the marriage of members of his family and on their maintenance. " Still are not all these acts such as might have been expected on the part of a " member of the family who had received a grant for his maintenance? Or must " they be accepted as incontestable proof of an intention to separate from Ranjit " Narain from the time of the grant and of a separation in fact from that time ?

" It has not been contended before us, nor indeed could the contention be " accepted as a sound one, that a separation in estate and from the joint family " must follow as a necessary consequence from the receipt of a maintenance grant.

" The learned Subordinate Judge has accepted these facts coupled with the " admitted separation in food as sufficient proof that from the date of the main- " tenance grant, Ranjit Narain and Bhupat separated and ceased to be members " of a joint Hindu family. We have given our careful consideration to the " judgment of the Subordinate Judge and also to the evidence and the arguments " of the learned pleader and Counsel which have been advanced before us and " even though we accept the findings of the Subordinate Judge we are unable to " agree in his conclusion that the plaintiffs have proved that there was a separa- " tion in intention or in fact."

" The fact that after the grant of the mokurari lease for maintenance Bhupat " Narain lived in a separate house alongside his family homestead, that he and

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"his branch of the family were afterwards separate in food and possibly in worship "and that he paid the expenses of his family out of the profits of the property "granted to him for maintenance, by borrowing money on mortgages on that "property, do not appear to us in this case to be sufficient to prove that there "was a complete separation between Bhupat Narain and Ranjit Narain, by which "Bhupat sacrificed his expectancy to succeed to the family property on the failure "of nearer male heirs of Ranjit Narain."

In the opinion of their Lordships, the evidence clearly proved that there had been complete separation between Thakur Ranjit Narayan Singh and his brother Bhupat Narayan Singh in worship, in food and estate, and they find that there had been complete separation.

Their Lordships infer from the extracts which they have quoted from the judgment of the learned Judges of the High Court that those Judges considered that there could have been no complete separation of the joint family, as the impartible estate of Taluka Telwa had not been partitioned between Thakur Ranjit Narayan Singh and his brother Bhupat Narayan Singh. Those learned Judges overlooked the fact that Bhupat Narayan Singh and his son had no coparcenary rights in the impartible estate, and no rights in that estate which entitled them or either of them to a partition of the impartible estate. They could not have prevented Thakur Ranjit Narayan Singh from alienating that impartible estate in such a way as to determine any contingent interest they had in it under the custom. Their contingent interest under the custom was liable to be defeated by an alienation of the estate by Thakur Ranjit Narayan Singh even if the family had remained joint, and as the family ceased to be a joint Hindu family the ordinary Hindu law of the Mitakshara gave to the Thakurani her widow's interest in the impartible estate in priority to the contingent interest of Chaturbhuj Narayan Singh under the custom. The Thakurani sold a moiety of the impartible estate to the Maharaja, and as there was valid necessity for that sale she conveyed a good title to the Maharaja.

Their Lordships will humbly advise His Majesty that these consolidated appeals should be allowed, that the decrees of the High Court should be set aside with costs and the decrees of the Subordinate Judge should be restored.

The respondents, Chaturbhuj Narayan Singh and his four minor sons, must pay the costs of the appeals.

Solicitors for appellants: *Downer and Johnson.*

Solicitors for respondents: *T. L. Wilson and Co.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Seshagiri Aiyer and Mr. Justice Napier.

Appayya Shetty ... *Appellant* * *Defendant.*

v.

P. M. Mahammade Beari and others ... *Respondents, Plaintiffs and Defendants 1 and 2.*

Appayya Shetty *v.* Mahammade Beari.

Landlord and Tenant—Permanent lease—Forfeiture for non payment of rent—Lease-deed providing for days of grace—Effect—Court's power to relieve against.

Courts have power to relieve against forfeiture even when there is a period of grace allowed in the lease deed.

Per *Napier, J.* (*Seshagiri Aiyar, J.* contra): it is not permissible to look to the provisions of the Transfer of Property Act for guidance in this matter as they are expressly made in applicable to agricultural leases.

Second appeal against the decree of the District Court of South Canara in A.S. No. 73 of 1912, preferred against the decree of the Court of the District Munsif of Kasargod in O. S. No. 690 of 1910.

B. Sitarama Rao, for appellant.

K Ramanatha Shenai, for respondent.

The Court delivered the following

Judgments:—*Seshagiri Aiyer, J.*—I have had the advantage of reading the judgment which my learned brother is about to deliver. As the question is one of considerable importance and as the decisions bearing on it are not consistent with each other, I think it desirable to state my views on the subject shortly.

The lease to defendants Nos. 1 and 2, is a permanent one. The plaint says that the produce was set apart for a religious service. I take it that the grantor was only anxious that he should be paid the rent. He gave up rights of possession, etc., when he granted this permanent lease. The original grantees paid the rent regularly for 16 years. It was after the transfer of their interests to the 3rd defendant in 1907, that default was made. There were three years' arrears of rent when the suit was brought. The document in question provides for the payment of the first year's rent with that of the second year. If rent remained unpaid even then, the lessees were liable to be evicted. The question is whether under the circumstances above set forth, the defaulting essees are entitled to be relieved from forfeiture. There is no atutory provision for forfeiture on non-payment of rent regardg agricultural leases. It is open to Courts to look at legislative ɔvisions regarding the liability of other lessees and tenants as

* S. A. No. 1989 of 1913. 10th August 1915.

Appayya Shetty v. Mahammade Beari.

Seshagiri Aiyar, J.

embodying the principles of equity, justice and good conscience. I cannot accede to the proposition that such a guidance should be sought only from English decisions and not from statutory provisions in this country.

Let us first see how the Legislature has treated tenants under the Estates Land Act. Chapter VI of the Act deals exhaustively with the remedies open to the landholder. He can sue for the rent or distrain; the proceedings to be taken on distraint are hemmed in with strict conditions. The landholder has to exhaust all available sources before he sells the defaulter's interest in the holding. The distress will have to be withdrawn, if the arrears are deposited or security given for their payment. Even after the commencement of the sale, the tenant is given a *locus penitentiaè* to save his property. It is thus clear that the legislature has provided very salutary restrictions against turning out a tenant from his fields. As regards other lessees, the Transfer of Property Act lays down that the forfeiture clause must be express. S. 114 provides for relief from the forfeiture incurred even after the institution of the suit. The Indian Statue Law therefore distinctly leans against forfeiture for non-payment of rent. I may also refer to S. 74 of the Contract Act which has abolished the distinction between penalty and liquidated damages and has enacted a general rule affording relief to the defaulting party under certain limitations. Now, turning to the English law, the course of decisions leaves no room for doubt that courts have striven against evicting tenants from their holdings. The case of *Peachy* v. *The Duke of Somerset* [1] to which our attention was drawn by Mr. Sitarama Row and which was followed in the earlier decisions of this Court enunciates the proposition that where the intention of the parties is only to enforce punctual payment, the forfeiture clause will be relieved against. In *Bouser* v. *Colby* [2], the tenant applying to redeem a forfeited lease was not required to pay the rent and costs into court before being decreed possession. All the cases have been reviewed in 2 White and Tudor 255 and the result of the authorities is stated to be that the proviso for re-entry on non-payment of rent i regarded in equity as merely a security for the rent and that reli will be given on payment of the arrears and of the expens incurred. In England, there can be relief after suit is broug

1. (1724) 1 Str. 477. 2. (1841) 1. Hare 109.

and before judgment. There is a further indulgence given even after judgment provided the costs of the suit are paid in addition. The period within which this latter remedy is available is now restricted to 6 months after judgment [15 and 16 Victoria Chapter 76, S. 210]. Relief after decree may not be granted in India, as the effect of it will be to enable the executing Court to vary the decree. The decision in *Nagappa* v. *Venkat Row* [1] proceeded on the footing that the compromise decree was only evidence of the contract between the parties and that the court was not varying the decree in such cases. *Balambhat* v. *Vinayak Ganapatrao* [2] is to the same effect.

The rule to be deduced from an examination of the legislative provisions and authorities bearing on the subject is that *prima facie* the clause for re-entry on non-payment of rent is intended only as security for the payment of the rent. Therefore courts should relieve against this clause, if the arrears and expenses are paid and if the parties can be placed in *status quo ante.* In *Kilmer* v. *British Columbia, Ltd.* [3], it was pointed out that Courts should not encourage the enforcement of the strict letter of the contract which contains a penal provision. The payment of the money being the principal aim of the contract, the proviso is designed to hold out a threat relating to its fulfilment. As has been concisely put in Story's Equity Jurisprudence, S. 1316. " In reason, in conscience, in natural equity, there is no ground to say, because a man has stipulated for a penalty in case of his omission to do a particular act (the real object of the parties being the performance of the act), that, if he omits to do the act, he shall suffer an enormous loss, wholly disproportionate to the injury to the other party. If it be said that it is his own folly to have made such a stipulation, it may eqally well be said that the folly of one man cannot authorise gross oppression on the other side. And law, as a science, would be unworthy of the name, if it did not to some extent provide the means of preventing the mischiefs of improvidence, rashness, blind confidence and credulity on one side; and of skill, avarice, cunning, and a gross violation of the principles of morals and conscience, on the other. There are many cases in which courts of equity interfere upon mixed grounds of this sort. In

1. (1900) I. L. R. 24 M. 265. 3. (1911) I. L. R. 35 B. 239.
3. (1913) A. C. 319.

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no country is there a greater need for the application of this beneficent statement of the law than in India, and if it is true that we are administering both equity and law in our courts, there must be an endeavour on our part to soften the rigour of the law and to mete out substantial justice unless our hands are tied by the legislature. It is this view of the functions of a court that inclines me to hesitate to follow some of the decisions of this court to which I shall presently refer. In *Naraina Naick* v. *Vasudeva Bhatta* [1] it was broadly laid down that if a contract provides for days of grace where rent is not paid in time, courts should not relieve against forfeiture. *Narayana Kamti* v. *Handu Shetty* [2] is to the same effect. The learned Judges seem to suggest that English decisions are distinguishable inasmuch as ordinarily days of grace are not provided in lease deeds executed in England. Our attention has been drawn by Mr. Sitarama Row to the forms of lease-deeds printed in Woodfall on Landlord and Tenant, which give days of grace (See p. 1069). Apart from this, I fail to see on what principle the insertion of such a clause should be held to disentitle the tenant from equitable relief. The observations of that great Jurist, Story J. are particularly applicable to such carefully designed provisions. I think the true principle is that which *Ramakrishna* v. *Baburaju* [3] enunciates. Each case must be judged by itself. The delay, the conduct of the parties, the difficulties to which the landholder had been put should be weighed against the tenant. A number of circumstances may be mentioned which would induce courts to condone the faults of the tenant. A hard and fast rule that a contract providing for days of grace ought to be enforced strictly is not calculated to advance justice. *Ramakrishna* v. *Baburaya* [3] has been followed by Sadasiva Aiyer and Tyabji, JJ. in *Thirthaswamiar* v. *Rangappayya* [4]. In second appeal No. 2,568 of 1912, the same learned Judges relieved against non-payment of 6 years' arrears. The earlier decisions of this court are all favourable to the tenants. *Kothal Uppi* v. *Edavalath Thatham Nambudri* [5] and *Subraya* v. *Krishna* [6]. In *Timmarsa Puranick* v. *Badya* [7] the rule of *Peachy* v. *The Duke of Somerset* [8] was applied.

In the present case, the pleadings and the findings do not

1. (1903) 28 M. 389
2. (1901) 15 M. L. J., 210.
3. (1912) 23 M. L. J. 715.
4. (1913) 25. M. L. J. 486.
5. (1871) 6. M. H. C. R. 258.
6. (1882) I. L. R. 6. Mad. 159.
7. (1865) 2. Bom. H. C. R. 66.
8. (1721) 1 Str. 447.

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show that the defendants have forfeited their claim to equitable relief by any conduct on their part.

I would therefore reverse the decrees of the courts below and direct that if the defendant does not pay the arrears of rent due up to November 1914, with interest thereon, at 12 percent. per annum as well as the costs of the plaintiff in all the three courts, within four months from the date of this decree they shall deliver up possession of the property and this second appeal will stand dismissed with costs. If the payment is made, they shall be put in possession of the suit property, if the plaintiff has already taken possession, with mesne profits to be determined in execution.

Napier, J.

Napier, J.—The only question that arises in this appeal is whether the 3rd defendant, the assignee from defendants 1 and 2 of the lease under the *mulgeni* karar, is entitled to be relieved against forfeiture for non-payment of rent. The rent is 1 year in arrears, and the karar, Exhibit A, allowed a period of one year before the operation of the forfeiture clause. On behalf of the plaintiff it is conceded that the forfeiture clause can be relieved against, but it is contended that where there are days of grace, the rule does not apply. On behalf of the defendants, it is contended that the alleged rule that after the days of grace the clause must be enforced is not supported by authority. In *Narayana Kamti* v. *Handu Shetty* [1] and in *Naraina Naika* v. *Vasudeva Bhatta* [2] Judges of this Court undoubtedly laid down the strict rule: but in the earliest case of this court *Kottal Uppi* v. *Edavalath Phathan Nambudri* [3] the principle is stated to be that a penalty for the purpose of securing rent should always be relieved against. It is true that *in this case* there were days of grace, but I fail to see how what was intended as a benefit to the lessee can be made use of, to deprive the Court of its power to grant relief.

The latest case is *Rama Krishna* v. *Baburaya* alias *Venkatesh Hegade and others* [4]. There the late Chief Justice and Mr. Justice Sankaran Nair laid down that relief must depend upon the facts of the particular case. They distinguish the case in *Narayana Kamti* v. *Handu Shetty* [1], on the ground that in that case a long period was allowed, some 8 months and there was no stipulation that the tenant should on

1. (1905) 15 M. L. J. 210.
2. (1903) I.L.R. 28 M. 389.
3. (1871) 6 M. H. C. R. 258.
4. (1912) 23 M. L. J. 715.

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default lose the value of his improvements; and rely on the doctrine laid down in the case of *Kottal Uppi* v. *Edavalath Thathan Nambudri* [1], and on *Mahalakshmi Amma* v. *Lakshmi* [2], a case in which a period of grace was allowed and in spite of that, the clause was relieved against. I quite agree that the question must, to a certain extent, depend upon the facts of each particular case, but I think that it is necessary to decide whether the existence of days of grace is a bar as held in the two cases quoted above.

It is sought to apply the provisions of the Transfer of Property Act, as laying down the principle which should guide the Courts although admittedly those sections do not apply to agricultural leases; and this contention has found favour with some Judges of this Court. With all respect I regret with deference to the contrary view held by my learned brother, I cannot agree with this view. I entirely accept the proposition that where the statute embodies equities with respect to certain classes of transactions with which it is dealing it is reasonable to found equities with regard to other classes of transactions on the principles there enuniciated but where the statute specifically excludes one transaction of the same class as that which is with—in its purview, we cannot apply the same doctrine. We do not know why the legislature exempted agricultural leases from the purview of the Transfer of Property Act lease sections. It might be that the legislature thought that the provisions for forfeiture of rent embodied in those sections were not suitable to agricultural leases. It is not open to us to investigate the reasons for the exclusion and we cannot therefore presume that some other cause operated on the mind of the legislature. If we are to apply equity in relieving against forfeiture, we must, in my view, seek for it outside the Transfer of Property Act; and the proper course is to ascertain the practice in England and apply it subject to such modifications that seem proper in view of the in conditions in this country. This was the course adopted by this Court in the case in *Kottal Uppi* v. *Edavalath Thatham Nambudri* [1]. There reliance is placed on *Peachy* v. *Duke of Somerset* [3]. The language of the Lord Chancellor is as follows, "the true ground of the relief against penalties is from the original intent of the parties *viz.*, where the

1. (1871) 6 M. H. C. R. 258. 2. (1911) 21 M. L. J. 960.
3. (1724) 1. Str. 447.

penalty is designed only to secure money and the court gives him all tha the expected or desired." This is treated as the leading case in White and Tudor, Vol. II, where the learned editor points out that even where the penalty of the bond is to secure a collateral object, the court will grant relief (vide *Sloman* v. *Walter* [1]) and states as the result of the examination of the authorities that "from a very early period" equity would, at any *indefinite* time after a tenant had incurred forfeiture *and been ejected for non-payment of rent* at a particular time under a stipulation in his lease, relieve him, upon his paying to the lessor the rent accrued due, interest and costs, upon this principle that as the right of entry was intended merely as a security for the rent, the lessor thereby received full compensation, and was put in the same situation as if the rent had been paid to him when it was originally due." The principle was re-stated by the Lord Chancellor in *Sanders* v. *Pope* [2], with an explanation at page 289 as to the origin of the covenant which is as follows:—"The obvious intention of the clause is to secure the payment of the rent; that the landlord may not be put to his action of debt, coming from time to time against an insolvent estate; but may be enabled to recover possession of the premises. In that case equity is in the constant course of relieving the tenant paying the rent and all expenses, and placing his landlord in exactly the same situation." In a later case *Hill* v. *Barclay* [3], the Lord Chancellor distinguishes the case of forfeiture arising out of a covenant to repair on the ground that in some cases it might not be possible to put the landlord in exactly the same position by ordering the tenant to make the necessary repairs. The doctrine is stated in Story's Equity Jurisprudence, as founded on the theory that the right of entry is deemed to be intended to be a mere security for the payment of rent, and in paragraph 1316, the learned writer states as follows: "In reason, in conscience, in natural equity, there is no ground to say, because a man has stipulated for a penalty in case of his omission to do a particular act (the real object of the parties being the performance of the act), that, if he omits to do the act, he shall suffer enormous loss, wholly

1. (1874) White and Tudor, 8th Ed. Vol. II, p. 234.
2. (1806) 12 Vesey Jun. 282; s. c. 33 E. R. 108.
3. (1811) 18 Vesey, Jun. 56; s. c. 34 E. R. 238.

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disproportionate to the injury to the other party." It seems to me that we should apply these principles in India and I find nothing in the cases and nothing in the principles on which they are founded to support the view that the insertion of days of grace in a lease will oust the jurisdiction of the court to relieve; the origin of the covenant and its purpose are enunciated in the above cases. We have to apply it to the present case. This is a permanent lease, a lease very common on the West coast of India, one by which the lessor deprives himself of any possibility of increase of rent for all time. He has reserved nothing to himself but his muli right. The leaseholder has a permanent and alienable right in the property, a position infinitely stronger than that of the agricultural lessee in England for a term of 7, 14, or 21 years.

In relieving against the forfeiture we can therefore give to the jenmi "all that he expected or desired" in the words of the Lord Chancellor in *Peachey* v. *Duke of Somerset* [1] *(i.e.)* the rent reserved, and in my opinion we should be very slow to refuse to do this in these circumstances. Neither the fact that there were days of grace nor that the rent is years in arrears should operate to prevent the application of the doctrine. I recognise that this would lead to a systematic refusal to pay rents until after a suit to enforce the forfeiture clause; but I think that the injury is exaggerated. Such a practice will bring its own punishment for it would lead to the discontinuance of the permanent leases by mulgenidars and compel them to grant mulgeni chits for short terms only, as is done in many cases; I would add that legislative authority was given to this doctrine of relief in 4 Geo. II. Ch. 28; and its extent curtailed by the Common Law Procedure Act of 1852. section 210. I do not think it necessary however to refer to the specific provisions of the Act, as I would prefer to base my judgment on the principles enunciated by the Courts of Chancery apart from the Act.

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1. (1724) 1 Str. 447.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

FULL BENCH.

Present:—Mr. Justice Oldfield, Mr. Justice Sadasiva Aiyar, and Mr. Justice Bakewell.

The Secretary of State for India in Council, by the Collector of Ganjam. *Appellant (Appellant in Appeal No. 124 of '06 on the file of the High Court—1st deft.).*

v.

Kannepalli Janakiramayya and others. *Respondents (Respondents in do.—Pffs. and 2nd and 3rd defts.).*

The Secretary of State for India v Janakiramayya

Madras Land Encroachment Act (Act III of 1905) S. 2—Madras Irrigation Cess Act (VII of 1865)—Amendment to—Construction of—Preamble—Not to limit—Declaratory Act—Applicability to pending suits—Crown grant—Construction in favour of Crown—Sanads—Effect of—Ownership in flowing water—Streams bounding the Zamindari if conveyed—English rules of construction—Riparian rights and ownership distinguished—Ownership of bed not ownership of water—Specification of wet area in Sanads, &c.—Object of—Evidence Act S. 93—Government publications—Value of, in construing grant.

Per Oldfield, J.—Madras Act III of 1905 being as regards the ownership of Government in flowing waters a declaratory Act, has a retrospective operation and ought to be applied even in suits which were pending at the date when it was passed.

The right of a riparian owner in the water of the adjoining stream is only a right of user and is in no sense a right of ownership. He has no right to allow it to be used by a non-riparian proprietor or for the purposes of a non-riparian tenement.

The presumption of Government ownership as laid down in S. 2 of Act III of 1905 is not rebutted by showing that the bed of the stream belongs to another wholly or in part.

The rule that Crown grants are to be construed beneficially to the Crown applies to permanent Sanads issued to Zamindars, Inamdars, &c.

Neither the language of the Sanads nor the conduct of the Government and its officials justifies the view that the ownership in water of natural streams which adjoin the Zamindari is granted to the Zamindars.

The opinions and intentions of the Government and its officers as expressed in the various Government publications are not legitimate materials for the construction of the grant in favour of the Zamindars, regard being had to S. 93 of the Indian Evidence Act.

The operation of Act VII of 1865 is not confined to rivers in ryotwari tracts or to cases of irrigation works constructed by the Government.

The fact that the channel which brings the water from the river was at the time of the settlement part of the irrigation system of an estate, does not make the water, water of the Zamindar.

Sadasiva Aiyar, J.: S. 2 of Act III of 1905 enacts only a rule of evidence and as such is applicable even to pending suits.

The presumption of ownership in flowing water raised by it is rebutted by showing that the bed of the stream over which the water flows does not belong to

* L. P. A. No. 39 of 1913. 6th August, 1915.

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the Government. That section cannot be reasonably held to abrogate the ordinary juristic principles regarding flowing waters or to create a new kind of ownership in the Government in respect of them which entitles them to impose assessment for their use though they themselves have no ownership in them.

It is now too late to question the rights of Zamindars to half the bed of the streams which adjoin the Zamindary.

The amendment of 1900 to Act VII of 1865 cannot apply to water flowing over or percolating into Zamindari or Inam lands and no cess therefore can be levied under the Act for the use of such water excepting probably in the case of water made available for irrigation through works belonging to or constructed by Government.

Per Bakewell, J.—Act III of 1905 applies to such cases of limited property as arise from ownership of the river bed. The owner of the river bed has a qualified ownership in the stream of water which flows over it by virtue of which the river or stream may be said to belong to him.

The decisions relating to the construction of English conveyances of land are inapplicable to the Sanads issued under Regulation XXV of 1802 and it cannot be presumed that half the river bed forming the boundary of the Zamindari passes to the Zamindar.

The Sanad cannot be construed as a grant of all the rights vested in the sovereign in respect of the Zamindari except such as were expressly reserved. It does not purport to create any rights of property or to make a grant of any particular estate in land but rather to invest a certain person with the position and status of Zamindar, to make that position permanent, transferable, and heritable and to fix the land-tax payable to the Government. The rights of the Zamindar are such as were appurtenant to the Zamindari at the date of the Sanad and the burden is on him to show that his rights extended beyond the natural boundaries of the Zamindari. Where half the bed of a river belongs to the Government the water flowing from the river at any point is water which comes by direct or indirect flow from a river or stream belonging to Government from or through adjoining land and is therefore chargeable under Act VII of 1865.

The object of specifying in the original grant and at the Inam settlement the number of wet acres is to declare the extent of the grantee's rights of irrigation, that is; he is allowed to take only sufficient water to irrigate the number of acres therein dealt with as wet.

Per Oldfield and Bakewell, JJ.—The operation of Act VII of 1865 is not limited by the preamble to the Act.

The judgment of Sankaran Nair, J., in *Secretary of State* v. *Janakiramayya* [1] reversed.

Appeal under clause 15 of the Letters Patent against the judgment of the Honourable M. Justice Miller, and the Honourable Mr. Justice Sankaran Nair, in Appeal No. 124 of 1906 preferred against the decree of the District Court of Ganjam in O. S. No. 30 of 1904.

The Hon'ble the Advocate-General (F. H. M. Corbet) (*S. Sundararaja Iyengar* with him) for the appellants.

The question is whether the levy of water-cess by the Government on the plaint lands is legal. The plaintiff is the Inamd

1. (1912) I. L. R. 37 M. 322 ; s.c. 24 M. L. J. 365.

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of the village of Varahanarasimhapuram. This is a pre-settlement Inam. The history of the Inam is not in evidence, but according to the affidavit of 12th July 1915, it was originally part of the Jalmur Zemindari. In 1809 the Jalmur Zemindari was sold for non-payment of the peishcush, was bought in by Government, and thus became ryotwari. It remained under the *Amani* system for about 27 years. This Inam had been granted to the plaintiffs' ancestor when the Havelly lands were settled permanently. It was enfranchised in 1864. It is clear, therefore, that the plaint village has never been part of the Urlam Zemindari.

In this case there is no engagement between the plaintiff and the Government by which the irrigation is to be free from a separate charge. The Inam title-deed granted to the plaintiffs' ancestors is not in evidence. It is to be presumed that it conformed to the standard-form of an Inam Sanad. The difference between the Sanads granted to Zemindars and Inamdars is marked. See for the nature of an Inam title-deed, Board's Standing Orders, Vol. II, page 153, paras 2 and 4; Inam Selections, page 86. In the case of an Inam there was no fixity of tenure before the Inam Settlement. The amount of quit rent payable after settlement went by the acreage. In the standard form of an Inam Sanad there is a reference to the acreage, wet and dry, on which the assesment is imposed.

[*Oldfield, J.*: The original Inam title-deed does not reserve any right to impose enhanced assessment for increased cultivation.]

It is implied in the statement of acreage. After the enfranchisement, the Inam stands on the same footing as ryotwari land.

[*Oldfield, J.* Subject to immunity from increased assessment].

In the absence of the grant it is impossible to conjecture what the engagement was. Statements in the Fifth Report on which the judgment of Sankaran Nair, J., is largely based, are not evidence of an agreement in any particular case, to permit free irrigation to an unlimited extent.

[*Oldfield, J*: The important point is rather whose water irrigates than whose lands are irrigated and to what extent.]

This brings us to the question whether the plaint lands are irrigated with Government water. The Vamsadhara is a Government river. It is a navigable river. See Ganjam District Manual, page 2. It flows through the Government Taluq of Chicacole before it reaches the sea. See Ganjam District Manual

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page 231. Many of the villages on its banks are Government villages. There is nothing in the evidence in this case to show that the Vamsadhara river or the Mobagham channel was expressly conveyed to the Urlam Proprietor.

[*Bakewell, J*: Is there any express reservation of the beds of rivers and channels in the grant? If not, they will pass along with the lands to the grantee.]

In the case of Crown grants, whatever is not expressly given is reserved to the Crown. *Suryanarayana* v. *Potanna* [1], *Vaman Janardan Joshi* v. *Collector of Thana* [2], Coulson on Waters, page 28. So far I adopt the reasoning of the learned Judge as to Ashtabhogam and rely on para 9 of the affidavit. From the non-reservation of the bed you can at the most presume that the Government undertook not to charge for water necessary for the cultivation of mamool wet lands in the Zemindari. The peishcush also was fixed with reference to the area of land then irrigated. The mere conveyance of the bed of a river, so far as it lies within the limits of a Zemindari, does not stamp the water in the river as Zemindari water. The moment the water leaves Zemindari limits it becomes public property. The Vamasadhara is a natural stream. The owners of the banks and lands adjacent thereto do not own the water. Farnham, Vol. II, pp. 1461 and 1462. Their natural right is defined by the Easements Act, S. 7. The water in the stream is the property of the Government. S. 2 of Madras Act III of 1905, declares the ownership of Government in all standing and flowing waters which are not the property of any one else. The Act is declaratory and therefore, also retrospective. Maxwell, p. 361.

The Mobagham channel takes off from the Vamsadhara and irrigates the plaint village. The plaint village is an Inam situate entirely outside the limits of the Urlam Zemindari. The Urlam proprietor has no right to take the water of the Vamsadhara and pour it on to the plaint village. The plaintiff Inamdar is in direct relation with Government. If with the aid of Government water he cultivates a larger area than is specified in the grant, he is liable to pay the cess under Madras Act VII of 1865. *Chidambara Rao* v. *Secretary of State for India in Council* [3], *Luchme Doss* v. *Secretary of State for India* [4], *Secretary of State for Ind*

1. (1913) 26 M. L. J. 99 at 107.
2. (1869) 6 B. H. C. R. 191.
3. (1903) I. L. R. 26 M. 66.
4. (1909) I. L. R. 32 M. 457.

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v. *Ambalavana Pandara Sannadhi* [1], *Secretary of State for India* v. *Swami Naratheswarar* [2]. *Sankaran Nair J*, in his judgment relies largely on the preamble to Act VII of 1865 to show that the Act does not apply to a case like the present. The preamble is not to be used to restrict or extend the plain provisions of a Statute. *Ganesh Krishnaji* v. *Krishnaji* [3], *Vithu* v. *Govindu* [4], Maxwell pp. 52, 56.

I am entitled to object to the assumptions of the learned Judge (*Sir Sankaran Nair*) and to his conclusions based on materials not discussed in the argument before him; but all I ask is that this case may be sent back for a new trial so as to give the defendant an opportunity to bring the facts to the knowledge of the Court. In order to obtain a new trial I am willing to submit to any terms, and now offer to pay all the plaintiff's costs to date in any event.

T. Rangachariar, (*P. Nagabhushanam* with him) for the respondents.

In an estate settled under Regulation 25 of 1802, the rivers flowing through the estate and the beds and banks of such rivers belong to the zemindar by virtue of the grant. This is subject to the rights of other riparian owners. The Urlam estate formed part of the Havelli lands of the East India Company and was purchased in 1810 by the ancestor of the present holder. Regulation 25 of 1802 and the Sanads granted thereunder make it clear that the object of the Government was to give security to property by providing that the assessment on the zemindari lands should never be liable to change under any circumstances. The old zemindaries and the new estates carved out of the Havelli lands were placed on the same footing. See Fifth Report, Vol. II., pp. 330 and 331, paras 58 and 60. Waste lands were expressly granted and their cultivation contemplated. The water-courses were conveyed to the grantees of the Havelli lands unless they were of great or general importance. See Fifth Report, p. 331, paras 59 and 60. The onus is on the Government to show that any particular water-course was reserved. Having regard to the promise of fixity of assessment, the grant of waste lands in the hope of extensive cultivation, and the grant of water courses and tanks,

1. (1910) I. L. R. 34 M. 366.
2. (1910) I. L. R. 34 M. 21.
3. (1889) I. L. R. 14 B. 387.
4. (1896) I. L. R. 22 B. 321.

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the conclusion is irresistable that the right to the water which is so essential for cultivation, was also conveyed. The term "water course" is wider than a river. A river is composed of bed, banks and water. Angell on Waters, p. 3 ; Farnham on Waters, Vol. II. p. 1462, 1557. *Embrey* v. *Ownen* [1]. Not only the water course is conveyed but the duty of repairing and maintaining it is cast on the grantee. Fifth Report, p. 326, para 37. The mere grant of a river without the usufruct is uncommon. Conveyance of land includes water standing thereon. See S. 6 of the English Conveyancing Act 1881 ; Carson Real Property Statutes, p. 87. *Maclaren* v. *Attorney-General of Quebec* [2]. Under the grant therefore, the Urlam proprietor became the owner of the "Vamsadhara" and its waters within the limits of Urlam. The Government ceased to be the owner. The Mobagham channel which takes off the Vamsadhra does not carry Government water to plaintiff's lands. The cess is therefore unsupportable under Act VII of 1865.

Where a river flows by a zemindari half the bed of the river and the waters therein belong to the zemindar who owns the bank and the lands adjacent thereto. *Sri Balusu Ramalakshmamma* v. *Collector of Godavari* [3], *Secretary of State* v. *Perumal Pillai* [4], *Raja Srinath Roy* v. *Dinabandhu Sen* [5]. The Zemindar has an unlimited right of appropriating the water provided he does not injure lower riparian owners. There is no pretence that the Government can tax the Urlam proprietor if he cultivates the mamool wet or waste lands with a greater quantity of water. Irrigating lands is a natural user of water in this country. *Madras Railway Company* v. *The Zamindar of Karvatnagar* [6].

Even in the case of Crown grants in the absence of any express words of reservation the right to water passes. Angell, p. 92 *Balbir Singh* v. *Secretary of State* [7].

At the point where the Mobagham channel takes off the Vamsadhara, the bed and the waters therein belong to the Zemindar. The water in the channel is not Government water.

Assuming that Vamsadhara is a Government river, still if there is a channel taking off from the river which at the time o

1. (1851) 6. Exch. Rep. 369.
2. (1914) A. C. 258.
3. (1899) I L.R. 22 M. 464.
4. (1900) I.L.R. 24 M. 279.
5. (1914) 27 M. L. J. 419.
6. (1874) 1 I. A. 364.
7. (1896) I. L. R. 22 A. 96.

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the Settlement formed part of the irrigation system of the estate, the channel and the waters therein belong to the estate. *Ponnuswami Thevar* v. *Collector of Madura* [1]. The Mobagham channel was in existence at the time of the grant. It has never been improved or repaired by the Government. The channel and the waters were conveyed to the Urlam proprietor by the grant. The mere fact of extended cultivation does not in such a case authorise the levy of a cess. *Secretary of State* v. *Naratheeswara* [2], *Zemindar of Kapileswarapuram* v. *Secretary of State* [3]. *Venkataratnammah* v. *Secretary of State* [4].

Act VII of 1865 does not contemplate a levy of cess in cases of this kind. The object of the legislature in passing the Act was, as the preamble shows, to obtain a return for the cost incurred by Government in repairing and improving water-works and not to realise increased revenue where the same facilities for irrigation exist. This is a fiscal enactment and ought to be construed strictly. Before imposing a cess it must be shown that the water used comes from a river or stream belonging to Government. This is not a case of supply of water within S. 1 of the Act. *Venkatappaya* v. *Collector of Kistna* [5], *Krishnayya* v. *Secretary of State* [6]. The mere fact of extensive cultivation does not impose liability to cess. *Secretary of State* v. *Perumal Pillai* [7], *Appasami* v. *Secretary of State* [8], *Maria Susai Mudaliar* v. *Secretary of State* [9]. The Government have never improved in any way this channel and they cannot claim to levy the cess.

As regards the effect of Act III of 1905, it merely lays down a rule of evidence or of presumption. It does not take away any right which existed at the time the Act was passed. Its object and scope are entirely different. A statute merely laying down a rule of evidence or presumption ought not to have retrospective operation so as to affect substantive rights. *Nairn* v. *University of St. Andrews* [10], *Venkataratnammah* v. *Secretary of State* [4], *Sri Rajah Jagapathi* v. *Secretary of State* [11].

The Hon'ble the Advocate-General (in reply).

1. (1869) 5 M. H. C. R. 6.
2. (1911) I. L. R. 31 M. 21.
3. (1911) I. L. R. 37 M. 355.
4. (1911) I. L. R. 37 M. 364.
5. (1889) I. L. R. 12 M. 407.
6. (1895) I. L. R. 19 M. 24.
7. (1900) I. L. R. 24 M. 279.
8. (1910) 1 M. W. N. 107.
9. (1904) 14 M. L. J. 350.
10. (1909) A. C. 147.
11. (1914) 28 M. L. J. 51.

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It is now clear that justice cannot be done in the absence of the evidence which I am prepared to lead on behalf of the Crown, and I renew my offer to pay all costs up to date in any event if the case is sent back for a new trial. The facts are brought out to some extent in the affidavit sworn on 12th July 1915 on behalf of the defendant Appellant........

[*Mr. Rangachariar* :—I object to new evidence being led at this stage.]

[*Oldfield J.* :—We have been reading this affidavit for the last three days.]

A Zemindar or Inamdar is not the owner of the soil. Under the Sanad all that he gets is the melvaram. Even assuming that he gets a proprietary right in the land, he gets such a right only in lands which are the subject of assessment to land-revenue. Reg. 25 of 1802 operates only to transfer lands which are subject to assessment. The banks and beds of rivers and porambokes which are not the subject of assessment were not transferred to the Zemindar. The Zemindar is merely the farmer of revenue without proprietary rights in the soil. See Fifth Report, pp. 5, 6 *et seq.* The beds and banks of an artificial channel were not the subject of assessment and did not pass to the Zemindar or Inamdar. Kinney on Irrigation. The standard form of Sanad does not contain any transfer of the channel and its waters. Act III of 1905 declares the proprietary right of Government in waters of rivers and streams and is retrospective. The water used by the plaintiff was Government water. The levy of cess is therefore legal.

The Court delivered the following

Judgments:—*Oldfield, J.* :—This is an appeal from the decision of two learned Judges, given under section 98 of the Code of Civil Procedure, in accordance with the confirming judgment of one of them, Sankaran Nair, J. The question is whether water-cess was legitimately levied by Government, the appellant, from plaintiff for the water of the Vamsadara river, which they have admittedl used in their inam village for the irrigation of (1) second crop, (wet (or irrigated) crops grown on dry (or ordinarily unirrigat land. The decision of this question will be a sufficient adjudicat

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on the plaintiffs' claims to a refund of past collections and an injunction as to the future.

Plaintiffs did not dispute that they used the water of the Vamsadara, as alleged. The dispute is therefore only whether it belongs to and can be charged for by Government. Government has relied on section 2 of Act III of 1905 in support of its ownership of the water and section 1, Act VII of 1865, in support of its right to charge for it. The material portion of the former is as follows:—"(1) All public roads, streets, lanes and paths, the bridges, ditches, dikes and fences, on or beside the same, the bed of the sea and of harbours and creeks below high water-mark and of rivers, streams, nalas, lakes and tanks, and all canals and water-courses, and all standing and flowing water, and all lands, wherever situated, save in so far as the same are the property (*a*) of any Zamindar or Inamdar or any person claiming through or holding under any of them, are and are hereby declared to be the property of Government except as may be otherwise provided by any law for the time being in force, subject always to all rights of way and other public rights and to the natural and easement rights of other land-owners, and to all customary rights legally subsisting," and of the latter:—"Whenever water is supplied or used for purposes of irrigation from any river, stream, channel, tank, or work belonging to, or constructed by, Government, it shall be lawful for the Government to levy at pleasure, on the land so irrigated, a separate cess for such water, provided that where a Zamindar, Inamdar, or any other description of land-holder, not holding under ryotwari settlement is by virtue of engagements with the Government, entitled to irrigation, free of separate charge, no cess under this Act shall be imposed for water supplied to the extent of such right and no more." As regards the first of these enactments, it is not material that it was passed only during the pendency of this litigation in the Court of First Instance. For it is as regards the ownership of water a declaratory Act, and such Acts have retrospective effect. (Maxwell on Interpretation of Statutes, 3rd Edition, p. 309). Plaintiffs demur to its application on the grounds that the legislature cannot be supposed to have intended (1) to confer a right of ownership in flowing water, a thing not capable of ownership, or (2) to confiscate existing rights of irrigation or to affect them at all, when the purpose of the Act is only to justify charges for the unauthorised

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occupation of water and land. These objections are invalid. For (1) it is only in the last resort and for clearer reason than has been shown that the meaning of the general provision declaring that water belongs to Government can be nullified. For as regards (1) the Act statedly makes a general declaration that water belongs to Government; and it is only in the last resort and for clearer reason than has been shown that I can construe it by holding that flowing water can belong to no one. And as regards (2) there is no question of taking away existing rights, but only of reserving them and assigning the burden of proof regarding them. The reference to water would be pointless with regard to its occupation, as by a boat on it, the example suggested, since nothing makes such occupation chargeable; whilst the inclusion of only a declaration of ownership as to water without a machinery for charging for its unauthorised use, such as is provided for land, is easily intelligible in view of the fact that the requisite machinery in the case of water had already been provided in Act VII of 1865. It will be necessary to return to the provision of that Act in another connection. At present it is material only that plaintiffs allege no engagement exempting from water-tax the cultivation now charged for and admit that it is not included in the extent referred to in their title-deed as wet. They are therefore bound to prove that the water in question is not Government water; that is, that in the words of Act III of 1905 it is the property of a Zamindar or Inamdar or a person claiming under one.

The plaintiffs' village, Varahanarasimhapuram, is not on the bank of the Vamsadara river, and the water reached it by the Mobagam channel which passes through the Urlam Zamindari. The Judgment of Sankaran Nair, J., refers throughout to the village as part of the Zamindari, but mistakenly. For it is, it is admitted, an independent inam village, which was part of the Jalmur estate and, having been bought in with the rest of that estate about 1808, is now held directly under Government. Mr. Rangachariar for the plaintiffs has accordingly attempted to establish tha' the water was either theirs or the property of Urlam. He at one tim proposed to argue that plaintiffs had easement or other customar rights against Urlam, which would in some way not explaine justify them in claiming the water against Government. F this corresponded with nothing in the plaint or, so far as the ju

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ments showed, in the arguments at earlier stages of the case, and we refused to hear it. His contention was then that the water, being the absolute property of plaintiffs or Urlam, was in the latter alternative used by plaintiffs in accordance with some arrangement or license by the Urlam proprietor, the nature of which could have no bearing on the material point, that the water did not belong to Government, and therefore was not material for the purpose of his argument. That case is intelligible. It is only to be borne in mind, that so far as it relates to Urlam, proof of nothing less than absolute ownership is essential in order to sustain it. For we have been shown no authority for holding that mere riparian rights, short of ownership of the water, extend to its diversion for the irrigation of land other than that belonging to the riparian owner himself. S. 7. illustration (f), Indian Easements Act, negatives the wider view of such rights. The Calcutta High Court refused in *Belbhadar Pershad Singh* v. *Sheik Berket Ali* [1] to apply the American doctrine on the subject to India. And this Court in *Fischer* v. *The Secretary of State for India* [2] held that, if the English law were applicable, the disabiltiy of a riparian owner to use water for non-riparian tenements was absolute and did not depend on proof that actual damage was caused by his doing so. Mr. Rangachariar put his case for the ownership of the river water by Urlam on two alternative foundations; and I shall now deal with the first of them.

It was stated by Mr. Rangachariar as follows:—When a river, such as the Vamsadara, flows by a Zemindari, such as Urlam, half the river bed adjacent to the Zamindari and the water thereon belongs to the Zamindar, and the other half to the opposite riparian owner, subject to superior riparian rights in the water. The District Judge dealt with this, apparently with the consent of the parties, by a reference to his judgment, Exhibit M in this suit, in another litigation relating to the same river and estate, Original Suits Nos. 37 and 38 of 1904, his finding being that the bed and consequently the water did not belong to Government.

That judgment was of course given before Act III of 1905 and e imposition of the burden of proof on the private claimant, scribed in it; became law. It is sufficient that it was based the rejection of an argument from the alleged tidal and

1. (1906) 11 C. W. N. 85. 2. (1908) I. L. R. 32 M. 141 at 164.

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navigable character of the river and an inference as to the ownership of its waters from the ownership of the channels, conveying them to the irrigated land, which I shall deal with later. It is not in my opinion clear that the English and American principles relied on by Mr. Rangachariar, as supporting the ownership by the riparian owner of half the bed adjacent to his holding can be applied to India, where Government has special rights and as regards irrigation, special functions. The Indian authorities dealing with accretion are not relevant, since they are concerned, not with ownership of the river-bed, but with a special method of acquiring ownership in formations in it above water. And I am inclined to share the doubt expressed by Sadasiva Aiyar J. in *Meenakshi Amma* v. *Secretary of State for India* [1]. A decision on this part of plaintiffs' contention is however unnecessary, because I do not think that ownership of the water will follow from the ownership of the bed or the moiety of it adjacent to the holding.

It is evident that this principle must be scrutinised carefully, before it can be accepted. For its practical application would be most difficult. The right of Government for instance to control water for irrigation purposes has been recognised in *Fischer* v. *Secretary of State for India* [2], cited above and other cases; but when that right is in question, whether it is general, as founded on authority, or it arises only from the ownership of the opposite bank, how is it to be exercised or limited to the control of only half the water ? and how is such limitation to be imposed on opposite proprietors ? It is significant that no decisions appear to have been given by the Courts on claims, so likely to result in controversy. As regards authority, plaintiffs rely mainly on the early doctrine, embodied in the maxim "*Cujus est solum, ejus est usque ad coelum*," which is stated at page 78, Coulson's "Law of Waters" 3rd Edition. But they neglect the learned author's conclusion, that it is supported by modern authors only as regards standing and percolating water and running water, which remains for the whole of its course on the land of a single owner, but that "with regard to natural streams flowing throug adjoining lands, the enjoyment of which is only usufructuar and not absolute, the right to use the water does not arise fro the ownership of the soil on the stream, but from the right

1. (1914) 26 M. L. J. 385 at 404. 2. (1908) I. L. R. 32 M. 141.

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access to it which land owners on the banks have by the law of nature." It will be observed that this statement of the English law, which I adopt, since it has not been shown to be incorrect, attributes to individuals a right of user in certain circumstances, not of ownership; and I recall the fact that, as observed *supra*, the establishment of the right to such user will be insufficient to justify Urlam in supplying plaintiffs. The Law in England as regards ownership will be made clearer by a quotation from *Embrey* v. *Owen* [1] :—"Flowing water is *publici juris*, not in the sense that it is a *bonum vacans*, to which the first occupant may require an exclusive right, but that it is public and common in this sense only, that all may reasonably use it who have a right of access to it, that none can have any property in the water itself, except in the particular portion which he may choose to abstract from the stream and take into his possession, and that during the time of his possession only."

On the English Law, plaintiffs have relied almost exclusively, as regards this part of their case, and it does not support the plenary ownership of the water by Urlam or more than its right of user for cultivation of its own adjoining lands, and not for any supply to the lands of others, such as plaintiffs. That is sufficient to negative the case of private ownership, as based on the ownership of the bed and banks, and to authorise the application of the presumption referred to in Act III of 1905. It will be convenient to postpone dealing with the Indian cases, until plaintiffs' alternative foundation for the ownership of the river water by Urlam has been considered.

It was stated by Mr. Rangachariar as being that in a permanently settled estate, such as Urlam, where a river flows through or by the estate, the river bed and waters, to the extent to which they are in that estate, were granted with it to the Zamindar in 1803, subject to superior riparian rights.

It is admitted that the Urlam Estate was formed out of Haveli lands, that is, lands which before the Permanent Settlement were in the possession of no Zamindar. There can therefore be no question of the existence of any rights, such as Zemindars enjoyed, before 1802 in this case; and it can be said at most that rights identical with those of Zemindars elsewhere were then conferred. The sannad containing the terms, on which the

1. (1851) 6 Exch. Rep. 369.

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estate was granted in 1803, has not been exhibited. But it is agreed that it is in the standard form given at page 119, Vol. II, Board's Standing orders (1907). It is conceded that it supports plaintiffs' contention in no degree directly. For it refers only to land assessment and makes no reférence to rivers or other water-supply in connection with the grant. The argument is accordingly that, as the references are to land and land assessment or revenue alone, no further payment was to be made on any other account in connection with cultivation and therefore none on account of river water. Particular reliance has been placed on clause 4 by which provision was made for the liability of the estates for payments in addition to the land tax for various other articles of revenue of which water tax is not one, the inference being that, as such articles are enumerated and the enumeration must be supposed to be exhaustive, the omission to mention water-tax entails that none was leviable. These are the only grounds, on which it is proposed to imply a grant of all river water for irrigation, past and future, from the terms of the sannad itself; and they are in my opinion inadequate. No doubt ordinary existing irrigation was granted, since payment for one irrigated crop would in accordance with usage be included in the total consolidated land tax or peshkush, so far as it was for the wet land in the estate. That peshkush was, as Sankaran Nair, J., has shown in another connection in his judgment, fixed arbitrarily, and it is not possible to distinguish the portions of it payable for irrigation and land revenue proper. But, that is the most that can be allowed or with which authority and revenue practice are consistent. Extraordinary or second crop irrigation and extensions of irrigation are no doubt not mentioned in the sannad. But it is not a necessary inference that they also were included in the grant. For the intention may equally have been to charge for them separately, as has, it will be found in some cases at least, been done. As regards clause 4 the enumeration does not seem to me to be either exact or comprehensive. It has not for instance debarred Government from levying a duty on the possession of arms in Zemindaries or a road and railway cess for the benefit of Local Boards, although neither of these imposts comes within the descriptions of those, the right to which is reserved. In *Vedanta* v. *Kunniyappa* [1] this Court dealt with the clause and the connecte

1. (1881) I. L. R. 9 M. 14 at p. 19.

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section of the Permanent Settlement Regulation, XXV of 1802, holding that the dues then in question, included in the Sayer, were not exigible by the owners of land as such, but by the sovereign, and that, whatever the origin of their title, Government intended to treat the Zemindars with whom it effected a Permanent Settlement as landed proprietors, and to ignore any rights which conflicted with its own sovereignty. And the judgment goes on, "such a large proportion of the Crown revenues of India was derived from the land, directly or indirectly, that it was difficult for the early British administrators to separate with precision the revenue which could be collected conveniently by the Crown from that, the collection of which could more conveniently be kept to those subjects who had exercised the functions of collection under native rule" and later (p. 25) "It cannot be denied that in the sannads issued in virtue of the Permanent Settlement Regulation the Government dealt ordinarily only with the land revenue. The insertion in sannads issued by the Government of Madras of a clause repeating the declaration contained in the Regulation as to the exclusion of items of revenue other than land revenue was surplusage. Had the clause been omitted, it could not have been contended that the Zemindar was entitled to collect revenue other than the land revenue because of its omission. All this enunciates what the wording and matter of the sannad and regulation indicate, that the settlement proceeded on general lines and that a grant of one item of revenue is not to be inferred from silence regarding it. Such an inference, it must be added, is intrinsically improbable. For, whatever the actual irrigation in 1802 under the great deltas of the Kistna and Godavari, it cannot be supposed that their potentialities were overlooked or dealt with by implication, or that, if they had been transferred, there would have been no attempt in the sannad and Regulation or by some other contemporaneous enactment to provide for responsibility for their control or the decision of conflicting claims to their waters. The grant under construction as made by the Crown; and the rule of construction in point is ot, as it was held in *Balbir Singh* v. *Secretary of State for India* [1], at applicable to the grants of a particular description of property, the general rule, that grants by the Crown must be construed eficially to it. *Vaman* v. *Collector of Thana* [2], *Collector of*

1. (1896) I. L. R. 22 A. 96. 2. (1869) 6 B. H. C. R. 191.

Ratanagiri v. *Antaji*, [1], and *Suryanarayana* v. *Potanna* [2]. Thus, the direct and in my opinion the only legitimate grounds for a decision, because they alone are available from the actual terms of the grant, entail that no grant of the river water to the Urlam proprietor in 1803 is established.

Direct construction of the grant yielding nothing favourable to the plaintiffs, they have endeavoured to support their case further by collateral considerations; and they have, it will be found, made a similar attempt in connection with their proposed interpretation of Act VII of 1865. Those considerations consist in the alleged opinions and intentions of Government and its officers at the time of the Settlement, as expressed in various publications. I do not think that they are a legitimate ground of decision with reference to section 93, Indian Evidence Act, or the general principle that, if "the language of the statute admits of no doubt or secondary meaning, it is simply to be obeyed, without more." Maxwell on Interpretation of Statutes 3rd Ed. page 72. Here the fact that the sannad makes no reference to a topic, to which it might have referred, does not render its language ambiguous or defective; and the Regulation and the Act are in my opinion susceptible of a reasonable interpretation as they stand. I therefore enter on this branch of the argument solely because it has bulked largely here and in the judgment of the learned Judge.

It is a difficulty of a different kind that the matters in question, were (as plaintiffs' learned vakil admits) never relied on at the trial in the District Court or the hearing of the appeal, when Government might have dealt with them by explanation or counter-citation, but were first referred to in the learned Judge's judgment. The learned Advocate-General has however waived objection to them on that ground, claiming only the right to file documents in reply in case we think that such reply is required, and filing C. M. P. No. 1862 of 1915 for their admission. We have not thought them necessary; and we need only add that we felt bound to refuse to allow plaintiffs' vakil to make furthe references for the first time at this stage in the case to other pub cations including Baden Powell's "Land Tenures" and Vol. LX of "Records printed for the Madras Government".

It is not necessary to reproduce the extracts relied on, as greater part of them are given in the learned Judge's judgm

1. (1888) I. L. R. 12 B. 534. at 544. 2. (1913) 25 M. L. J. 99 at 107

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The inference from them must be weak, since they consist in the broadly expressed opinions and pious expectations of bodies so diverse as the Select Committee and the Famine Commission of 1880. The general argument in Court and in the learned Judge's judgment, so far as it is distinguishable from that based on the terms of the sannad already dealt with, seems to me to require more definite support from evidence than it has been given. In particular the assertion that some Zemindars had rights over rivers before the Settlement of 1802 and retained them after it and the attempt to corroborate that by reference to the transfer to other Zemindars, of which Urlam is one, of the duty of maintaining and constructing tanks and water-courses in Haveli lands, are open to question. For the present dispute which relates only to rivers, which are not mentioned in connection with Haveli lands and the ownership of tanks, to which (for all that appears) the water-courses referred to may have been appurtenant, and of the water in them would be subject to quite different considerations, with which we are not concerned. For the rest only three conclusions, which in my opinion require notice, have been drawn from these materials; and I do not think that they in any way probabilise the grant of river waters alleged. They are that (1) renters were expected to develop the lands entrusted to them by improving the channels and other works transferred to or left in their control (2) it was hoped that cultivation would be extended over land waste at the time (3) there was an impression that the existing supply of water would be continued. But as regards (1) it has still to be decided with reference to the authorities to be referred to, whether the assignment to renters of the duty of maintaining channels would involve any exemption of water flowing through them from charge or any transfer of its ownership ; (2) if an extension of cultivation was anticipated, it did not follow that the renter's profit was to accrue from his charging for water and not merely for the land; nd, unirrigated cultivation being common throughout the Presiency, it need not have been asssumed that the new cultivation ould be irrigated or would be irrigated gratuitously. And (3) if e continuance of existing irrigation was secured, that did not ail the grant of free additions to it. On the other hand, if ence of this description is to be considered, it is significant no more direct reference to anything approaching a plenary

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grant of the river water has been found, if one in fact was made, and that the one statement regarding irrigation works in the instructions to Collectors, that at page 331, Fifth Report, refers only to tanks and water-courses, not to rivers or works on them. In these circumstances I do not think that this line of argument, if admissible, assists plaintiffs appreciably.

There is next a contention that Act VII of 1865 is either inapplicable to charges for river water in Zemindaris and Inam villages or that its wording is consistent only with a grant of rights of ownership in river water to Zemindars and Inamdars before its date on the grounds that (1) the Act was passed in view of the necessity for realising returns from the lately constructed Kistna and Godavari anicuts and not in order to charge irrigation from private sources, where no improvement in or addition to those sources had been made and (2), it applies to rivers in ryotwari tracts only, not in Zemindaris.

As regards (1) I do not feel at liberty to interpret an Act, the body of which is clearly and comprehensively expressed, with reference to the alleged motives of the legislature. We have been referred to the preamble; but it can be treated as indicative of the scope of the Act, only when legitimate doubt regarding the latter arises from the uncertainty of its terms; and I feel none here. Moreover it is not clear that the preamble in this case justifies any conclusion. It no doubt refers to the necessity for "a fit return" being made to Government "on account of the increased profits derivable" from works constructed or improved by it. But the reference to both drainage and irrigation works as the preliminary to provisions, which authorise a charge only for irrigation, makes it doubtful whether any accurate statement was attempted; and in the absence of any subsequent provision for the calculation of the charge to be imposed with exclusive reference to the expenditure on some new work or improvement, with which the irrigation can be connected, it is impossible to hold that the right to charge is restricted to cases, in which suc connection can be established, or that other cases were intende to be exempt because of a previous grant of river water or for an other reason.

Then as to the alleged restriction of the operation of t Act to charges for river water in ryotwari tracts, that again based solely on inference, though it would have easily b

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susceptible of direct expression. It is urged that S. 1 must not be read as applicable to Zemindaris and Inams, because, but for its proviso, it would authorise the charging even of irrigation, in respect of which an engagement with Government exists, a result so unjust that the legislature cannot be supposed to have contemplated it, and that the proviso is useless to exclude this result, because it cannot apply to irrigation in Zamindaris and Inam villages, since the term "supplied," which is used in it, not "supplied or used" as elsewhere in the sections, is inappropriate to those tracts, inasmuch as it connotes a previous request for water which Zemindars and Inamdars do not and need not make. This attenuated line of construction must be distrusted, if only because its acceptance would leave it doubtful what class of cases the proviso was framed for. But in fact it rests entirely on the distinction between supply and use drawn in *Venkatappayya* v. *Collector of Kisna* [1], and *Krishnayya* v. *Secretary of State for India* [2]. It is not necessary for the present purpose to consider whether those decisions were correct. For they dealt with ryotwari cultivation in the Kisna district. In that district, as I shall show immediately, Government was at that date insisting on its rights, and under the rules for levy of water-cess on Zemindari and Inam lands in the Kistna and Godavari deltas at p. 2, Board's Standing Orders, Vol. II (1907), land-holders or the cultivators under them immediately concerned were being required to submit previous applications for the use of water. The interpretation of the term "supply" and the distinction now relied on between it and "use" would therefore have had no such implication in the district, in which these decisions were given, as that now suggested; and it may be doubted whether they would have been adopted, if the cases had come from other districts, such as Ganjam, that now in question. I therefore find no difficulty in applying the proviso generally to land irrigated under an engagement and the Act, as a whole, to river irrigation in Zemindaris and Inam villages.

Something has been said in this and other connections [i]n argument and in the learned Judge's judgment under appeal, [o]f the history of the relations between Government and the [Ze]mindars. It is argued for instance that the "engagement" in [the] proviso just referred to cannot have been merely for the

1. (1889) I. L. R. 12 M. 407. 2. (1895) I. L. R. 19 M. 24.

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exemption of lands cultivated wet in 1865, because it would have been impossible to distinguish for that purpose the extent of wet cultivation on which with other assets the peishkush was fixed in 1803. In some cases again it is known to have been fixed then on the extent of cultivation as ascertained before 1786 ; and it is not to be supposed that the increase between that year and 1802 would have been left out of the calculation, if the extent in 1802 had been intended to bind the Zemindar or Government in future. And similarly, to quote the learned Judge, "if the Zamindar is now made to pay cess for the excess area (over that allowed as wet at the settlement), he cannot now localise the area, if any, then under cultivation, so as to demand their contribution from the tenants, of the excess area." And reference has also been made to the failure of Government in this case to make any demand for many years up to 1894. These arguments however are not relied on as supporting any plea of prescription or estoppel against Government, but as relating to conduct, which will throw light on the meaning of the Sannad, Regulation and Act and the meaning of "engagement" in the last mentioned; and I deal with them only on that basis, and, as before, rather because the learned Judge has relied on them than because they are in my opinion admissible. Firstly, as to peshkush, the particular facts referred to by the learned Judge appear to have been among those imported into the case in his judgment. But, accepting them as given, I cannot with all respect see how they prove more than that the peshkush was fixed in some Zamindaris in a more and in others in a less arbitrary way ; and I cannot even in the case of the latter, such as Pittapur, draw any inference from the omission to bring sixteen years wet cultivation into the calculation. It is common ground only that at least wet cultivation existing before 1802 was included in it and became exempt from separate charge. When the calculation was, it is admitted, in all cases inexact and differed only in the degree of its inexactitude, it is conceivable as matter of conjecture, that either, as plaintiffs contend, the potential right ' the use of water in the future was included in the grant or th' it was reserved to be the subject of future arrangement, whi(was never made. But the choice between these two theor must then be made on the considerations already set out. would appear to be true that no effort was made conter

raneously with the Permanent Settlement to identify and register, that is, to localise the particular fields entitled to irrigation at its date. The omission was no doubt unfortunate and has led to litigation; and the hardship may no doubt be real as between the Zamindar and his tenants, when the former has to select from the latter the individuals, from whom he will recover what he has paid to Government. But similar hardship must ensue and presumably is taken into account in connection with every statute, by which the burden of proof is placed on the subject against Government and has to be discharged after the lapse of years; and that fact cannot justify the Court in presuming or accepting inadequately supported inferences in support of a grant, of which direct evidence is wanting.

There is, moreover, evidence available which, if this line of argument is legitimate, deserves consideration, since it consists in Rules published by Government, which are, it is to be presumed in the absence of anything to the contrary, indicative of the extent, to which Government has claimed, and Zamindars and Inamdars have acquiesced in a restriction of free irrigation, irreconcilable with these arguments. The theory of a grant of free irrigation from rivers in 1803 was no doubt stated by Mr. Rangachariar as I gave it above, as confined to those Zemindaries through which the river in question flows. But that restriction was frequently lost sight of in argument and does not appear to have been recognised in the judgment under appeal, the contention dealt with in it being for a general grant in 1802 of existing irrigation and such future irrigation as might ever be made available, without reference to the proximity of any part of the Zemindari to the source. And naturally so. For the restriction can have no logical foundation, when the grant is not supported with reference to riparian ownership and every argument for it, which has been adduced, would be equally valid, if the broader statement in the learned Judge's judgment had been in question before us. It will then be materially against plaintiffs, if it can be shown that some Zemindaris have been subjected to the charge for water for many years inconsistently with the grant which they allege as made to all and with their interpretation of Act VII of 1865. That, however has been the case as regards the large Zamindaris, including Nuzvid and Pittapur in the Kistna and Godavery districts, under

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Rules published originally in 1861, and republished last in 1906, which are printed in the judgment of Sankaran Nair, J., in *Zamindar of Kapileswarapuram* v. *Secretary of State for India* [1], Board's Standing Orders, Volume II, (1907). Rule 10 of the original rules and rule 6 of the later, no doubt restrict liability to water-tax, payable on lands charged as irrigated at the time of, or possessed of means of irrigation, before the construction of the anicuts. But the reason for this restriction, the effect of which was discussed in the case above mentioned, is presumably to be found in the difficulty, already referred to, of determining what land was and was not irrigated at the date of the Permanent Settlement, not in any consciousness that land newly irrigated since it, would not have been liable to charge in consequence of the Zamindar's ownership of the river water. For, if that ownership had been tacitly admitted, it would have been impossible to do what the rules certainly provide for; that is, to treat Zamindars as liable for any charge for river water at all. It is not, it should be pointed out, possible to regard the charge under the rules as made in consideration only of the part played by the anicut in making the water available and as supplementary to a water rate imposed and retained by the Zemindar on account of the water itself. For it is not suggested and it is not, I believe, the case that any such payment is made to the Zamindar by the actual cultivator, though evidence of such a payment should have been available to support plaintiff's argument, if it corresponded with facts. Moreover, the tenancy law in force at different times in the Presidency, Section II (4) Act VIII of 1865, and Sections 30 (3) and 33 Act I of 1908, would discountenance such a pretension on the part of the Zamindar. Vide also *Ramesam* v. *Bhanappa* [2], and *Narasimham* v. *Ramaswami* [3]. When, as is the case, the grant in 1803 is alleged as founded throughout the Presidency in the same manner, the fact that it has been formally negatived by practice in two districts, in which the rights of Government have been continuously asserted, is against its validity in others, where they havenot.

The conclusions reached are against the establishment of the alleged grant in 1802 either directly or indirectly with reference to the wording of Act VII of 1865, or, if the evidence is admis

1. (1911) I. L. R. 37 M. 358 at p. 2. 2. (1883) I. L. R. 7 M. 182.
3. (1890) I. L. R. 14 M. 44.

sible, the conduct of Government and the expressions of contemporaneous opinions and expectations relied on. It remains to deal shortly with the cases, so far as they are in point with reference to each of the foundations, on which plaintiffs' claim has been argued, the ownership by Urlam of the river bed, and the grant. I have reserved both classes of cases for treatment together, because both are subject to the same observation, that they rather show the vexed nature of the questions in issue than support the existence of a current of affirmative authority in respect of them. For the earlier really decide very little and the later contain hardly any attempt to reconcile the conflicting opinions, which have been expressed.

The only early case as to the claim based on ownership of the river bed is *Narasimha Sastri* v. *The Secretary of State for India* [1]. In it the claim as originally made was as wide as plaintiffs'. But in Second Appeal that was abandoned, and the decree allowed merely the right of a riparian proprietor to a reasonable use of the water. The legitimate extent of such reasonable use was not defined; there is nothing to suggest that it included what plaintiffs here require, the right to irrigate the land of others; and the fact that Government claimed only the right of a lower riparian proprietor is immaterial, since a wider claim would have resulted in no more favourable decision. On account, it may be, of some systematic and novel attempt by Government to assert its rights, the other decisions on this part of the argument and the majority of those relating to the grant date from 1908. *Fischer* v. *The Secretary of State for India* [2] recognised the paramount right of Government without reference to Act III of 1905, not only to regulate river water, but also to ownership in it, since, after deciding that any surplus of water after the Zamindar's customary requirements had been satisfied was at the disposal of Government, the learned Judges held that the paramount right of Government under the law of the Presidency was independent of the ownership of the bed of the stream. In *The Secretary of State for India* v. *Swami Naratheeswarar*, [3] the plaintiff was an inamdar, but it is admitted that his rights would be identical with those of a Zamindar; and it was held immaterial that the natural stream, which was in question,

1. (1891) 1 M. L. J. 167. 2. (1908) I. L. R. 32 M. 141.
3. (1910) I. L. R. 34 M. 21.

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had been swelled by rain water. The conclusion was in favour of Government, and it was observed that Act VII of 1865 is not based on any theory of the ownership of the bed of a water-course being the foundation of a right to use the water free of charge. *Kandukuri Maha Lashmamma* v. *The Secretary of State for India.* [1] was decided in appeal against the judgment in the case already referred to, as containing the District Judge's finding on this point, and is statedly dissented from by Sankaran Nair, J. in his present judgment. The conclusion in favour of Government is based on Act III of 1905 and a statement that the owners of land on the river banks do not own its water. So far the current of authority is clearly in favour of Government. But in *Venkataratanamma* v. *The Secretary of State for India,* [2] the Court decided for plaintiff, on the ground that the ownership of water from a Government source followed ownership of a branch channel, by which it was conveyed. *Ambalavana Pandara Sannathi* v. *The Secretary of State for India* [3] was referred to, but in it the ownership of the branch channel was not established and it was unnecessary to consider what its effect on the ownership of the water would have been. So far as *Venkataratnamma* v. *The Secretary of State for India* [2], is in point (for it refers only to a channel carrying Government water, not to a river) its authority is impaired by the fact that it does not take account of Act III of 1905 or the reference to water, as well as water-courses in it, and makes no reference to other cases already mentioned. In *The Secretary of State for India* v. *Ambalavana Pandara Sannathi* [4], the judgment adopted the positions as to the effect of Act III of 1905 and the connection between ownership of the river bed and water now under consideration, though it may be observed that the finding as to plaintiff's right to water sufficient to fill his tanks would have been ground for a decision in his favour. Vide *Maria Susai Mudaliar* v. *The Secretary of State for India* [5]. Lastly there is the judgment of Sankaran Nair, J., in *Rajah Gajapathiraju* v. *The Secretary of State for India* [6], to the same effect, whilst the other learned Judge concerned, Spencer, J., did not, if I understand him correctly, express a definite opinion on either point. The safe conclusion from these authorities is, I think, only that the theory of a

1. (1910) I. L. R. 34 M. 296.
2. (1911) I. L. R. 37 M. 364.
3. (1905) I. L. R. 28 M. 539.
4. (1910) I. L. R. 34 M. 369.
5. (1904) 14 M. L. J. 350.
6. (1914) 23 M. L. J. 51.

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connection between the ownership of the river bed and water is of recent growth and that the affirmative reasons which are necessary in order to support it and to displace the earlier decisions have not been given.

The first case relied on as supporting a grant in 1803 is *Ponnusawmi Tevar* v. *The Collector of Madura* [1], and there is no doubt some language used, particularly in the judgment of Innes, J., which implies that a transfer of the right to use the water in a channel was the basis of the decision. But he connected that transfer, not with the Permanent Settlement, but with the acquiescence of Government in the plaintiff's enjoyment of what had become a customary right. And there is a caution to be observed in the application of this and other cases to the question before us, that references to and findings in favour of a right to water do not necessarily relate to water free of charge or deal with more than the right to water from a particular source or provided in a particular way. Thus in the case under consideration the plaintiff's right to free irrigation was never disputed, Government alleging that other sufficient provision had been made for it; and the decision is therefore irrelevant to the present argument. In *Maria Susai Mudaliar* v. *The Secretary of State for India* [2] and *The Secretary of State for India* v. *Ambalavana Pandara Sannadhi* [3], mittahs, parts of Zemindaris granted in 1803, were in question, the irrigation being by artificial channels, taking off from rivers; and these cases are relied on by the plaintiffs, though the estates were not riparian. But the rule laid down in general terms gave no support to their contention, since it was that the only undertaking to be implied from a grant of land by Government is one to supply water free of charge to the extent of the accustomed flow at its date, that flow in the earlier case being measured by the capacity of tanks, which the proprietor was entitled to fill, and in the later by the extent of land irrigated. In *The Secretary of State for India* v. *Ambalavana Pandara Sannadhi* [4], there is nothing to show whether this principle was referred to in argument; and it is not referred to n the judgment, parts of which appear inconsistent with it. The rgument based on a grant in 1803 made its first clear appearance

1. (1869) 5 M H. C. R. 6.
2. (1904) 14 M. L. J. 350.
3. (1910) I. L. R. 34 M. 370.
4. (1911) I. L. R. 37 M. 369.

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in *Kandukuri Mahalakshmamma* v. *The Secretary of State for India* [1] in which in fact the Urlam proprietor was plaintiff; and it is significant that it was postponed so long. It was rejected shortly, the Court describing the only engagement involved in the Permanent Settlement as it was described in *The Secretary of State for India* v. *Ambalavana Pandara Sannadhi* [2] and as it has been earlier in this judgment. "That the peshkush being fixed with reference to the area under irrigation, no further charge for the use of water should be made in respect of that area". There is next the judgment of Miller, J., in the case before us in favour of Government. *Kapaleswarapuram Zemindar* v. *The Secretary of State for India* [3] relates to the Kistna district and has already been discussed. My conclusion is that the recognition of a grant in 1803 is of recent date, though it is not clear how far the earlier decisions incompatible with one were given after any such full argument for the contention, as has subsequently been put forward. In the circumstances I can only hold that authority, if it does not support, is no obstacle to the decision I have come to.

The result is that neither the right of Urlam to the river water, whether as founded on ownership of the river bed or on grant in 1803, nor plaintiffs' right, so far as it is alleged to be derived from Urlam, has been established. The presumption in favour of Government ownership, authorised by Act III of 1905 must therefore be made.

The remaining ground, on which Mr. Rangachariar argued the case, was an assertion of plaintiffs' direct ownership of the water. In consequence of the misapprehension of their position by the learned Judge, it is not distinctly referred to in his judgment; but it was stated before us as being that, where there is a channel, taking off from a river, and it is at the time of settlement part of the irrigation system of the estate, then, whether or no that channel runs entirely through the estate, it and all the water in it belong to the estate, subject to the customary right of others. In the present case the Mobagam channel, that in question, no doubt runs through the plaintiff's inam village after running through part of the Urlam Zamindari and before running through a Government village. But then we have the finding of th

1. (1910) I. L. R. 34 M. 296. 2 (1910) I. L. R. 34 M. 366.
3. (1911) I. L. R. 37 M. 355.

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learned District Judge, which we have been shown no reason for dissent from, that there is practically no evidence to show that the channel was dug by plaintiffs' ancestor or that any repairs were executed by them or their fellow inamdars on it or of any title of plaintiffs or their ancestor to it. In these circumstances it is impossible to hold what plaintiff's argument requires, that the channel is part of the irrigation system of their village. Further, if any part of the channel were plaintiff's property, the conclusion already reached that the river water is the property of Government would be valid against them; and we have been shown no reason for holding that Government water becomes the property of any individual, who succeeds in bringing it into a channel on his land. That position would no doubt be justified directly by *Venkataratnamma* v. *Secretary of State for India* [1] already referred to, and indirectly perhaps by other cases which I have declined to follow. It is however negatived by the statement in *Kandukuri Mahalakshmammah* v. *Secretary of State for India* [2].

"It does not follow, because the Zemindar provides the necessary channels to enable the irrigation of the Zemindari lands, that although those channels carry water supplied from a river or channel belonging to the Government the irrigation is nevertheless exempt from water-cess," and the same conclusion is also supported by other cases among those already dealt with. It is to be observed that the plaintiffs have not and probably could not have based their right to water without charge, as distinguished from mere supply of water, on custom. The decision on plaintiffs' claim, as based on their own independent right to free water, must also be against them.

I would for the foregoing reasons allow the appeal, dismissing plaintiffs' suit with costs throughout.

Sadasiva Aiyar, J.—It is unnecessary for me to state in detail the facts and contentions fully set out in the judgment of Sir Sankaran Nair, J., under appeal.

I might begin by saying that when two very learned Judges (Sir Leslie Miller and Sir Sankaran Nair) have differed on a question of law after each of them had bestowed an extraordinary length of consideration to the matter, it is with great diffidence that I express my own opinion on the question on which they have differed.

1. (1911) I. L. R. 37 M. 364. 2. (1910) I.L.R. 34 M. 295 at 301.

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I wish in the first place to clear the ground by a few short remarks on questions which are not either relevant or very remotely relevant to the points to be decided in this case and also on certain arguments advanced on both sides which to my mind are of dubious soundness.

(A. 1) The proviso to section 1 (b) of the Madras Act VII of 1865 which refers to engagements with the Government by Zamindars, Inamdars or other landholders need not be considered in this case. (What the engagement of a Zamindar or inamdar with the Government is, how it is to be ascertained, whether the area mentioned in an inam title-deed as wet is binding on the Inamdar or the Government and several similar questions connected with this matter have been considered in numerous cases of which the latest was decided by my Lord the Chief Justice and Mr. Justice Srinivasa Aiyangar about 10 days ago in Appeal Suit No. 53 of 1914).

(A. 2). A historical retrospect of the relations between the Government and the Zamindars, between the Government and their ryotwari tenants, between Zamindars and Inamdars, between Zamindar's and their ryots, between the Inamdars and their tenants, of the conflicting claims as to the ownership and proprietary rights over the soil made by each of these parties, of the claims to communal lands and so on, and so forth, seems in my opinion to be of little assistance in arriving at a true view of the provisions of the statute and case law which now mostly govern the rights of these parties. Historical deductions almost always differ according to various idiosyncracies, sympathies and prejudices of the students of historical data. Further, the rights of Zamindars, as they once existed or are alleged to have existed, cannot effect for better or worse their present rights. I am therefore unable to agree with the argument of the Advocate-General based on historical data that a Zamindar has now no proprietary right in the soil of the lands enclosed within his Zamindari limits, the argument being that as at one time he was a mere farmer of revenue under the old indigenous Governments, his claim to proprietorship of the soil of poramboke lands should be now negatived—nor do I attach much weight to the contentions of Mr. Rangachariar, based on the sovereign rights whic are alleged to have vested once upon a time in Zamindars, su sovereign right being alleged to include absolute powers of dispo

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of all lands within their territories. Regulation 25 of 1802, section 2, vests the proprietary right over the land within a Zamindari in the land-holder although that proprietary right may be subject to the communal rights of the villagers and to the occupancy rights of ryots, all which rights are now protected by statute law, that is by the Estates Land Act and other Acts. Numerous cases both in this Presidency (and in Bengal where permanent sannads were issued in practically the same form as in Madras) decided by the Privy Council and by the High Courts of Madras and Calcutta have established the rights of the owners of Permanently Settled Estates over the beds of the rivers passing through their Zamindari over the forest lands and hills and over the mines and minerals found within the Zamindari and over the tanks and the fisheries in the tanks and over the waters therein, that is, they have, in my opinion, eatablished the rights of the Zamindars *as proprietors* of the poramboke lands within their Zamindari limits. The inam title deeds for whole inam villages granted by Zamindars prior to the Settlement and confirmed by the Government (both prior to and at the time of enfranchisement) also vest the proprietary right in the poramboke lands (in Inam villages subject of course to the customary rights of the ryots and residents) in the inamdars; and the case law has, in my opinion, uniformly recognised that right of the Zamindars and Inamdars. The judgment in *Kandukuri Mahalakshmamma Garu* v. *The Secretary of State for India* [1], has accepted this position, so far as proprietary rights over poramboke lands are concerned (See also *Ponnusami Thevar* v. *The Collector of Madura* [2] and *Narasimha Sastri* v. *The Secretary of State for India* [3]).

(A. 3). The consideration of the questions whether the Government could have intended to be guilty of so much harshness and oppression as would result if a particular statute were to be interpreted in one way, and whether the legislature could have intended such a sudden change in the law as would result from a particular interpretation,—the consideration of these questions in my opinion, is of doubtful utility unless the words of the statute are so very ambiguous that it is legitimate to resort to such extraneous considerations. Speaking for myself, I am not satisfied that there is in this case justification for resort to such

1. (1910) I. L. R. 34 M. 296. 2. (1869) 5 M. H. C. R. 6.
3. (1891) 1 M. L. J. 16-.

extraneous considerations. Further, what might be deemed harshness and oppression on the part of the Government by a mind holding conservative views as regards the sacred rights arising from individual property in land might be considered by a mind with socialistic leanings (socialism except of the very extreme kind, not being a heretical doctrine in these days), as the proper beneficial exercise by the Government (representing the public communal interests) of its right to get the benefit of unearned increments and of the performance of its duty to utilize the sacred inalienable claims of the people as a whole to the common enjoyment of the benefits arising from all the lands within a State. I shall therefore dismiss from my mind the arguments of Mr. Rangachariar based on the alleged glaring iniquity and injustice of trying to get some more revenue out of Zamindars and Inamdars after the solemn promises alleged to have been made to them by high officers of Government several decades ago.

(A. 4) Further I do not feel much pressed by the wide language used in old English cases andrelied on by Mr. Rangachariar as to no individual human being, being entitled to claim ownership of flowing or standing waters, as water standing on or flowing over land (in this respect resembling the air of the atmosphere) cannot be made the subject of ownership until it is separated in vessels or solidified into ice and severed and appropriated as a moveable. Mr. Rangachariar quoted English Text Books and cases in support of his contention. Under the old English Common Law, it seems that as water is neither land nor tenement, it cannot be sued for *separately* in a Real Property action under the name of water or by measure so long as it is standing on or flowing over land, although the land which underlies it may be the subject of a common law action. I think that references to the technicalities of English Common Law actions merely tend to confuse the mind when it has to decide on the rights of Indian litigants. I shall therefore not deal with the arguments based on antiquated forms of action. The Indian Legislature in Madras Act III of 1905 has made reference to the "property" rights not only of Government but of Zamindars, Inamdars, Governmen ryots, Malabar Jenmis, etc., in standing and flowing water and Indian Courts must recognise such "property" rights so far a they are recognised by the Indian Legislature. Further, the

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of the wide words "owner", "property" and "proprietor", even in the case of lands has led to great confusion in the determination of occupancy and other rights (as pointed out by Sir Subramania Aiyer, J., in the Cheekati case.) *Cheekati Zamindar* v. *Ranasooru Dhora* [1].

(A. 5.) There were some arguments advanced at the Bar on the question whether the words "river", "stream", "channel," and "tank", found in Section 1 (a) of the Madras Act VII of 1865 meant (1) the beds, banks and the volume of waters taken together, in the river, stream, channel or tank, (2) or whether it meant the bed alone or the bed and banks alone of the river, stream channel or tank or (3) whether it meant only the collection of the waters in the river, stream, channel or tank. I think clause (b) of section (1) of that Act which speaks of "water *from* any such river, stream, channel or tank," clearly indicates that the words "river, stream, etc." are used in the sense of the collective body of waters which are called river, stream, channel or tank according to the respective configurations of the receptacles. The judgment in *Kandukuri Mahalakshmamma Garu* v. *The Secretary of State for India* [2], also takes the above view.

(A. 6) The question whether in a case where the irrigating waters though flowing over or standing on Zamindari or Inam land have been assisted in their beneficent work of irrigation by a work "belonging to or constructed by Government" (See the preamble and S. 1 (a) of Act VII of 1865) the Government can impose water-cess does not arise in this case (while it arose though only very partially in the Urlam case as pointed out in the judgment under appeal). The finding of the District Judge in this case (not disputed before us) is that no such work has been constructed by Government in connection with the Mobagam channel or with the branch channel till it leaves the Inamdars' limits.

(A. 7.) Lastly on the view I take of the facts of this case, it is also unnecessary to decide on the meaning of the word "supplied" in the first proviso to S. 1 clause (b) of Act VII of 1865. I might, however, say that I do not agree with the interpretation of that word given in *Venkatappayya* v. *The Collector of Kistna* [3], *Krishnayya* v. *The Secretary of State for India* [4], namely, that word 'supplied' when used in connection with water supply

1. (1889) I. L. R. 23 M. 318.
2. (1910) I. L. R. 34 M. 296.
3. (1889) I. L. R. 12 M. 407.
4. (1895) I. L. R. 19 M. 24.

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implies a previous request by the owner of the land which is supplied with water. As far as water supply is concerned, rivers, streams, channels and tanks are usually spoken of as supplying fields irrigated under them with water for such irrigation and the idea of a request to the source of supply is inadmissible in such cases. The argument based on the legislature not having in the Amendment Act of 1900 changed the word 'supplied' judicially interpreted as above in *Venkatappayya* v. *The Collector of Kistna* [1] and *Krishnayya* v. *The Secretary of State for India* [2], does not convince me that the legislature adopted that interpretation, as those cases related to water supplied to ryotwari lands and the amendment of 1900 fully established the rights of Government to levy assessment in respect of water even involuntarily supplied to such ryotwari lands. One other question may be shortly considered here. Assuming that the beds of streams and rivers flowing between banks, both of which belong to a Zamindar or an Inamdar are the property of the Zamindar or Inamdar and assuming that the waters standing on or flowing over such beds within the limits of the Zamindari belong to the Zamindar or the Inamdar (subject of course to the rights of lower riparian ryots in natural rivers and streams, and subject to the ownership over those waters ceasing to exist in the proprietor on the waters leaving such limits by evaporation or by flowing away) the question is whether when, one of the banks alone of a stream or river belongs to a Zemindar or an Inamdar, he is entitled to half the bed of the river or stream on his side. The rule of English Law no doubt is that such half along the length bounded on that one side by the riparian owner's land belongs to that reparian owner, provided of course the river is not a tidal or a navigable river. But is that also the Indian Law in all cases? In the case in *Meenakshi Amma* v. *Secretary of State for India* [3], I ventured to express an opinion that the Indian Common Law did not recognise this alleged right of the owner of the land in ryotwari tracts or in Malabar, which are not under the Permanent Settlement, to half the breadth of a highway or to half the breadth of the bed of a river adjoining such land. I am still inclined to h[...] that the historical incidents and peculiar feudal tenures connec[...] with English Real Property Law (which was probably furth[...] affected by notions derived from the Roman Law) may have ha[...]

1. (1889) I. L. R. 12 M. 407. 2. (1895) I. L. R. 19 M. 24.
3. (1914) 26 M. L. J. 385.

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much to do with the establishment of the doctrine that the soil of highways and of the beds of natural waterways belong in equal half breadths to the owners on both sides. I think that the Indian Common Law vested such rights in the village community as a whole within the village limits and in the Sovereign power as representing the community in other places. However, I think it is too late to question the applicability of this English Law so far as the beds of non-tidal and non-navigable rivers and streams *bounded by Zemindari and whole Inam lands* are concerned as the case law has established such rights in favour of the Zamindar and Inamdar.

Mr. Rangachariar, if I understood him aright, would not admit the right of the Government even to beds of rivers bounded by ryotwari lands on both sides. I can only say that I have never in my pretty long experience come across any case in which a ryotwari tenant-owner under Government has ever disputed the right of Government to dispose of islands thrown upon the bed of the river bounding his land or to make reclamations by planting with reeds (nanal) or otherwise from the bed of the river close to its banks and to grant such reclamations to anybody they like. Ryotwari lands stand on an entirely different footing from Zamindari and Inam lands as Government has not lost proprietary rights over ryotwari lands. That ryotwari land continues "to be Government land" while land in a permanently settled Estate is not Government land is further indicated by the definition of "Government land" in the Madras Survey and Boundaries Act IV of 1897, section (2) which says that "Government land means any land not forming as estate or any portion thereof" while clause 1 defines the word "Estate" as Zamindary Jagir, Mitta, Palayam, Inam village, etc. Thus the Government treats itself as owner of its Ryotwari tenants' lands while it treats the Zamindar and Inamdar as owner of the lands in permanently settled estates. A Jenmi holding lands in Malabar (where also there is no permanent settlement) is placed on the same footing as a person holding under Ryotwari tenure in clause 2 (1) (*a*) of Act II of 1905. In ryotwari tracts river bed porambokes and even mall channel porambokes (though running through pattah lands) re entered as Government property in public Revenue records. radual and imperceptible accretions to ryotwari tenants' holdings m adjoining poramboke are prevented by placing demarcation

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stones round patta lands. The Government still treats itself as the proprietor of the ryotwari lands whereas in Zamindari tracts, the Zemindar is the proprietor, taking the place of Government so far as proprietary rights are concerned, Government having as admitted in page 300 of the judgment in *Kandukuri Mahalakshmamma Garu* v. *The Secretary of State for India* [1] not reserved to themselves the beds of channels or tank beds or the village sites or other poramboke lands within the Zamindari limits.

As regards river beds, however, bounded by Zamindari lands on one side the Godavari Lanka Case decided so long ago as in 1858 (see Sudder Adawlat Decisions of 1858, p. 188) has established the right of the Zamindar to the soil of the bed of the river up to half its breadth on his side. Further, in my opinion, the learned Advocate-General's argument *contra* cannot be accepted in this case in view of the admission in the written statement, paragraph 3, which says that the portion of the bed of the Vamsadara river where the Mobagam channel takes off is within the limits of the permanently settled estate of Urlam. I might further add that the Zamindar's right to half the bed of the Vamsadara river along the length bounded by the Urlam Zamindari is taken as undisputed by the learned District Judge, Mr. Ayling (now Justice Sir William Ayling, one of the Judges of this Court) and his finding was not attacked in the Memorandum of Appeal filed in this Court. I might also state that in the written statement, the Government's right to levy assessment for the waters used by the Inamdars (plaintiffs) for irrigating their lands was based on the specific ground that the irrigating Mobagam channel and the branch Merakabatte channel belonged to and were under the control of the Government. (See paragraphs 3, 4 and 5 of the written statement). The learned District Judge found that these channels did not belong to Government, that the soil of the beds of these channels (at the point where the branch channel leaves the Inam limits) had been granted to the Urlam Zamindar about 1803 under the permanent sannad fixing his Zamindari limits and that the channels were never under the control of the Government. This finding of the learned District Judge is accepted by Sir Sankaran Nair, J., and not dissented from by Sir Leslie Miller, J., and, on the evidence, I am clear that that finding is correct. (See also the plan, Exhibit J., prepared by the Revenue Survey Departme

1. (1910) I. L. R. 34 M. 296.

in 1871 which demarcates half the river bed (including the site of the take off of the Mobagam channel) as belonging to the Zamindari village). The Secretary of State for India v. Janakiramayya.

Having thus cleared the ground, the only remaining question in this case might in my opinion be formulated thus:

"Do the waters flowing in the Vamsadara river at the length and over that portion of the bed, which bounds the Urlam Zamindari, and from which bed the Mobagam channel takes off, belong to Government within the meaning of the expression "water from river belonging to Government" found in Section 1 of Madras Act VII of 1865?". There can be no doubt that the Government starts with a strong presumption in their favour under Madras Act III of 1905, that all standing and flowing waters belong to them, but it is a rebuttable presumption. Though this suit was brought before Madras Act III of 1905 was enacted, and though the Government in their written statement relied upon the ownership of the Mobagam channel bed and the control over the waters in that channel as the foundation of their claim to treat the waters flowing into that channel from the Vamsadara river as their property, I cannot say that they are estopped from claiming proprietorship in those waters under the general presumption in their favour raised by Act III of 1905 passed during the pendency of this suit. The provision of that Act raising such a presumption in favour of the Government cannot, strictly speaking, be said to take away any rights vested in persons who had claims over standing and flowing waters. Rules of evidence enacted by the legislature come into force at once and must be followed by the Courts in deciding on the rights of parties, whatever may have been the previous state of the law in regard to the proper presumptions, and burden of proof under particular circumstances.

Taking it then that the plaintiffs in this case have to prove that the waters of the Vamsadara river at the particular place where the Mobagam channel takes off do not belong to Government, the question is, has that burden of proof been discharged in this case? If I understand the judgment in *Kandukuri Mahalakshmamma Garu* v. *The Secretary of State for India* [1], (See page 303) rightly, the opinion there is expressed that, even though the bed of the river may be vested in the owner of the land situated

1. (1910) I. L. R. 34 M. 296.

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along the banks so as to give him the right to accretions or lankas forming therein, (as has been decided in the Godavari Lanka Case) and though the bed of the river itself may belong to that adjacent owner, still the collection of waters flowing over the bed can never in any sense belong to that owner and can only belong to Government. The judgment says for instance, at page 303 "*the river, it seems to me, belongs to Government even though the bed may be vested in the owners of the land along the banks.*" It is said further on in the judgment "Now clearly the waters of the Vamsadara river do not belong to any one else but the Government. The owners of the land at the banks of the river do not own the water." Thus, if I understand the decision aright, all flowing and standing water though flowing over beds belonging to others or standing on tank beds belonging to others are the property of Government. In this connection, I wish to point out that not only "all standing and flowing water" wherever situate are and are declared to be the property of Government, but the words just coming after "all flowing and standing water" in Section 2 (1) of Act III of 1905 are "*all lands wherever situated.*" Thus as regards all lands also wherever situate, the presumption is created by that section that they, belong to Government unless proved to belong to Zamindars, Inamdars, etc. As regards standing water in tanks, can it be reasonably argued that the ownership of the tank bed has nothing to do with the ownership of the water standing on it? Can it be said that, even though rain water fills the tank, standing waters are the property of Government though the tank bed may not be the property of Government? It will be seen further that Section 2 clause 1 reserves all right of way and other public rights, all the natural and easement rights of other land owners and all customary rights legally subsisting. Thus all standing and flowing water is not made the absolute property of Government even when it is not proved to belong to the Zamindars or poligars or Inamdars or Ryots. That is, "plenary" rights are not declared in standing or flowing water, in favour of Government. The section again assumes that Zamindars, poligars, inamdars, etc., can have the same kind of "property" or ownership in standing and flowing waters as Government is declared to possess. The judgment *Kandakuri Mahalakshmamma Garu* v. *The Secretary of State for India* [1], says that it was not contended by the vakils for th

1. (1910) I. L. R. 34 M. 296.

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appellants in that case that the water was their property. See page 303. I do not know what precise admissions were made in that case. That flowing water *by its very nature* can never be the absolute property of the Government or anybody else (though the ownership in a very real sense can be predicated of it as vesting in a person so long as the water continues to be situated vertically over land belonging to that person) is clear to my mind; and when S. 2 (1) says that all standing and flowing water are hereby declared to be the property of Government (except as may be otherwise provided for by any law for the time being in force, subject always to all public rights and natural and easement rights of other landowners and to all customary rights) it seems to me that the legislature did not intend to give to the Government greater rights of ownership in flowing water than the principles of general jurisprudence would allow. It has been held in this Court that the Government cannot divert water even against the customary rights of their own ryotwari tenants, (though the water flows over beds of rivers belonging to Government) without providing other equally effective facilities for irrigation. When water flows in a river over the bed-portion belonging to one owner, that water is temporarily and usufructuarily his property (subject to well known natural rights of others). As soon as it leaves that portion of the bed and begins to flow over another bed-portion belonging to another owner, the water becomes the property of the owner of that bed-portion, subject again to the same rights. So, as *all lands* also are presumably declared to belong to Government, water flowing over *any land* is presumably the "property" of Government, the "property" in the water following the "property" in the land. I can find nothing in S. 2 of the Madras Act III of 1905 which was intended to give the Government greater rights over standing or flowing water vertically over their land than any other proprietor of land (like a Zemindar or Inamdar) has over water standing or flowing over his. The distribution of water *among their own ryotwari tenants* (see Chief Justice Scotland's judgment at page 19 of V, Madras High Court Reports) is no doubt a right which the Government exercise as Sovereign landlord; but after they had parted with proprietary rights over the beds of particular streams in favour of Zemindars or Inamdars, it is impossible in my opinion to hold that they retain proprietary rights over waters standing in tanks in

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Zemindaries or flowing through Zemindari lands or in water flowing in all natural channels or through artificial channels constructed with the knowledge and permission of Government and owned by the Zemindar or Inamdar or in water percolating into Zemindary and Inam tracts and such a claim was clearly negatived in the V, Madras High Court Reports Case. The Mobagam channel itself is an artificial channel belonging to the Urlam Zemindar (the channel at its tail end feeding the Mobagam tank belonging to that Zemindar). If *Kandukuri Mahalakshmamma* v. *The Secretary State for India* [1] has been uniformly followed from when it was decided in September 1910, I ought not, of course, to lightly differ from it. The only case in which it was so followed seems to be the case in *The Secretary of State for India* v. *Ambalavana Pandara Sannadhi of Tiruvaduthurai Mutt* [2]. But as pointed out in the judgment under appeal, there is a later decision of Benson and Sundara Aiyar, JJ., added to the report of the decision of the Division Bench on the present case reported in *Secretary of State for India* v. *Janakiramayya* [3], this later decision being found in *Venkataratnamma* v. *Secretary of State for India* [4] as a footnote case to the present case. The learned Judges Benson and Sundara Aiyar, JJ., say at page 368 " the channel was not one which passed through any Government property before it reached the village, and it is apparently not a large stream connected with any system of irrigation maintained by Government. There was no intention on the part of the Government at any time to derogate from the grant made in 1767. Both the learned District Judges who dealt with the case proceeded on the footing that the channel and other porambokes in the village belong to Zamindar or Inamdar. We see no reason to dissent from that conclusion. *It has therefore not been proved that the water irrigating the village belongs to Government.*" The learned Judges therefore clearly held that when flowing water passes over a river or channel bed which does not belong to Government, the water cannot be said to be the property of Government while it is so flowing over that bed. Of course, it may be said that the learned Judges did not refer to the decision in *Kandukuri Mahalakshmamma Garu* v. *The Secretary of State for India* [1]. That case, however, in *Kandukur*

1. (1910) I. L. R. 34 M. 296.
2. (1910) I. L. R. 34 M. 366.
3. (1912) I. L. R. 37 M. 322.
4. (1912) I. L. R. 37 M. 366. *et seq.*

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Mahalakshmma Garu v. *The Secretary of State for India* [1], could not have been absent from the mind of at least one of the judges (namely, Mr. Justice Sundara Aiyar) who decided the footnote case reported in *Venkataratnamma* v. *Secretary of State for India* [2], for it was Mr. Justice Sundara Aiyar (though he was not a Government Law Officer) whose well-known strenuous and powerful advocacy had been evidently specially secured by the Government for the conduct of the appeals in those Urlam cases in the High Court. If Mr. Justice Sundara Aiyar expresses an opinion as a Judge opposed to the opinion for which he argued at the bar, such an opinion of his as Judge carries by that fact much more weight, and his non-reference to the decision in *Kandukuri Mahalakshmamma Garu* v. *The Secretary of State for India* [1], from which he clearly differed in *Venkataratnamma* v. *Secretary of State for India* [2], is not difficult to understand under those circumstances.

There are two well-known legal maxims which usually come to mind in such cases. One is *Aqua currit et debet currere ut currere solebat* which signifies that water flows and ought to flow as it used to flow. Grounding on this maxim, it is usually stated that there is no property in running water, but merely a right to use it, and this right may only be exercised so as not to interfere with the use of the water by other persons similarly entitled. But the right to use it can itself be called a property in running water, and (as I have said already) it is not wise to confuse ourselves by juggling with the word "property," or the word "owner."

The other maxim is *Cujus est solum, etc.*, meaning that whoever is the owner of the soil, it is his even to the firmament and to the middle of the earth. This maxim is the basis of the rule that waters in ponds, tanks, and wells situated on land owned by a person belong to him in a very real sense, and that on the flowing water also running over his land, he has got a real right of property though of a qualified kind. S. 2 of Madras Act III of 1905 though it talks of property in waters both in the Government and in the Zamindar or Inamdar, contains (as I said) several clauses qualifying such right of property. I am reasonably clear that the maxim *Aqua currit, etc.*, was not intended to be abrogated in favour of Government. That it was not so intended

1. (1910) I.L.R. 34 M. 296. 2. (1912) I. L. R. 37 M. 366.

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in the case of a Zamindar or Inamdar, is not disputed and the language of the Section does not to my mind constrain us to hold otherwise in the case of water flowing over even Government lands. On the other hand, how else is a Zamindar or Inamdar to prove his "property" in "standing or flowing water" except by proving his "property" in the land situated over or under such water, it being clear from section 2 (1) (*a*) itself that such "property" can exist in him? *Narasimha Sastri* v. *The Secretary of State for India* [1].

There is, no doubt, a distinction in the extent of the proprietary or ownership rights of a man in water over his soil, according as the water is standing water (as in a tank) or water naturally flowing as a river (though the waters cannot be said to belong to anybody else so long as the waters are still vertically over his soil.)

But I find it very difficult to hold that there is another distinction between (*a*) the ownership rights of a man in the waters over the soil owned by him, without liability on his part to be taxed by Government for exercising the right of use of such waters springing from such ownership, and (*b*) the ownership of such waters with the right of user springing from such ownership being subject to the liability to be taxed by Government. I am unable to find that any such new distinction between the extents of rights in waters has been created by Act VII of 1865 or Act III of 1905. The former Act refers to a body of waters belonging to Government, and the latter enacts that all waters and lands *prima facie* belong to Government and that other claimants of rights of ownership in any such waters or lands have to prove their rights as against Government. The former Act gives a right to the Government to tax waters belonging to Government and used in the irrigation of the lands of persons *not owning the right in the said waters.* A new intermediate class of ownership in waters in which the soil proprietor has all the ordinary and natural rights to use the water which in his "property" but with liability to pay assessment to Government (though the Government cannot be said to own the waters as they do not own the soil under the water) seems to me to be not contemplated by either Act, and no such distinction seems to have been made before *Kandukuri Mahalakshmamma Garu* v. *Th*

1 (1891) 1 M. L. J. 167.

Secretary of State for India [1]. On the other hand, it was assumed, as a matter of course, in almost all the cases dealing with this question that if the Zemindar or Inamdar owns the right to use the waters unlimitedly (excepting of course the natural right of lower riparian owners) within his bed without interference from Government, he is entitled to use them free of assessment and he is entitled even to a refund of the assessment collected from him by the Government on the wrongful claim made by the Government that the irrigating waters belong to them. If a man has the ordinary juridical ownership over waters standing on or flowing over his land (the extent of his right being governed by the well-known rules relating to standing waters, flowing waters, upper and lower riparian rights, etc.,) he must also be free from assessment by Government for the use of such waters belonging to him, as the Government can have no ownership at all in such water till they leave his soil. A new ownership in waters in the Government entitling them to impose assessment for the use thereof though they have no ownership therein according to ordinary juristic principles, is again difficult for me to grasp and I am not satisfied that any such new kind of ownership was created by either of the two Acts.

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I am aware that by the amendment of 1900 to Madras Act VII of 1865 it has been enacted that when water from a river *belonging to Government* by direct or indirect flow, or percolation or drainage irrigates any land under cultivation, the Government is entitled to levy a separate cess for such water. In the case of rivers running over Government poramboke, the water is the property of Government and if it irrigates a ryotwari tenant's land by percolation it continues even after entering the tenant's holding, as I said, to be Government water, as the tenant's land also belongs in proprietary right to Government and is called Government land in the Survey and Boundaries Act. These considerations do not apply to waters flowing over or percolating into Zamindari or Inam lands and no cess can therefore be levied under Act VII of 1865 for use of that water, excepting probably in case of the water having been made available for beneficial irrigation through works belonging to or constructed by Government.

1. (1910) I. L. R. 34 M. 296.

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Bakewell, J.

In the result, I would dismiss this Letters Patent Appeal with costs.

Bakewell, J. :—The principal question in this appeal is whether the Vamsadhara river, at the place where the Mobagam channel takes off water which flows to and irrigates the plaintiffs' land, is a river or stream belonging to Government within the meaning of Madras Act VII of 1865.

A river cannot be the exclusive property of any person unless it flows throughout its whole course within his land, since if another person has a right of access to it he obtains certain rights of appropriating water from the stream and of preventing other persons from interfering with his rights, even though he has no right of ownership over the land whereon the river flows. See *Lyon* v. *Fishmongers' Company* [1]. It cannot have been the intention of the legislature to deal only with exceptional cases of this kind, and I think that this Act may be construed as applying to such cases of limited property as arise from ownership of the river bed. I think that the English authorities show that the owner of the river bed has a qualified ownership in the stream of water which flows over it, by virtue of which the river and stream may be said to belong to him.

It is admitted on behalf of the respondents that at the beginning of last century the British Government were the owners of the river bed and of the Urlam Zemindari which abuts thereon, and through which the Mobagam channel conveys water to the plaintiffs' land. It is also admitted by both parties that at about that time the Government issued a sannad of this Zemindari in common form, and it is argued on behalf of the plaintiffs that this sannad constitutes a grant of the full ownership of the land comprised in the Zemindari, subject to the rights of tenants, and that this grant must be construed in the same manner as a grant of land under English law and accordingly includes either the whole of the river bed and the bank adjacent to the Zemindari or at least the river bed *ad medium filum aquae*. The common form of sannad under the Permanent Settlement is not in form a grant of property, it contains no parcels, no dimensions, no boundaries or abuttals, and does not follow any precedent known to a British lawyer, but it is to a great extent a literal copy of the preamble and provisions of Regulation 25 of 1802 and diffe

1. (1876) L. R. 1 App. C. 662, pp. 673, 683.

from it principally in specifying the amount of the assessment to be paid by the Zemindar. Paragraph 13 states that "the foregoing conditions contain an abstract of the obligations and duties which you shall incur and of the rights which you have acquired under the new constitution erected for the security, protection and prosperity of the subjects of the British Government;" and the sannad concludes, after an exhortation to good conduct, with a declaration that the grantee is "hereby authorised and empowered to hold in perpetuity to your heirs, successors and assigns at the permanent assessment herein named, the Zamindari of..............." The sannad also contains a direction to the grantee to keep accounts, and for that purpose to maintain the village karnams or accountants, and to enter into agreements with the ryots. Both the sannad and the Regulation already mentioned contain the expressions "a permanent property in their land for all time to come," and "the proprietary right of the soil;" but the words "proprietors of lands" and "proprietary possession" have a technical signification in the Regulations, and "proprietary possession" has been explained by their Lordships of the Privy Council to mean "the possession and rights of a proprietor in the technical sense in which that word is sued, *viz.*, the person who pays the rent immediately to Government." *Oolagappa Chetty* v. *Arbuthnot* 1.

In Regulation IV of 1822 the Government found it necessary to declare that the provisions of previous regulations, including XXV of 1802, were not meant to define, limit, infringe or destroy the actual rights of any description of land-holders or tenants, and that tenants' rights should be determined by the Courts. I think that these Regulations and the form of sannad show that it was not intended to create any rights of property or to make a grant of a particular estate in land, but rather to invest a certain person with the position or status of Zemindar of a particular Zamindari, to make that position permanent, transferable and inheritable, and to fix the land tax or share of produce payable by the Zamindar or his assigns to the Government. Upon this construction the rights of the Zamindar are such as are appurtenant to the Zamindari at the date of the sannad, and think that the burden is upon him to show that his rights extend beyond the natural boundaries of the Zamindari. Doubtless the

1. (1874) L. R. 1, I. A. p. 306.

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Zamindar and his ryot would continue to exercise all rights naturally and openly enjoyed by them at the date of the grant; thus not only would the riparian villages be entitled to take water from the river, but the cultivators on an artificial channel in existence at that date, such as the Mobagam channel, would also be entitled to take as much water therefrom as would pass thereby and as the terms of their holding allowed. Any other construction would be contrary to the intention of the Government that the lands within the Zamindari should be profitably cultivated and that the Zemindar should obtain his proper share of the produce and be able to pay his assessment to the Government, and would be in derogation from the grant.

The riparian villagers may have made some use of the river bed and banks, but there is no evidence that any proprietory rights over them or the stream of water were exercised by these villagers or the Zemindar at the date of the sannad, and in my opinion the burden is upon those who assert that any such rights passed under the sannad to prove that they were appurtenant to the Zemindari and enjoyed therewith.

It is, I think, obvious that decisions relating to the construction of English conveyances of land, which assume conditions and presumptions different from those prevailing in India are wholly inapplicable to a sannad under the permanent settlement. Even if those decisions apply, the sannad can only be construed as granting the river bed *asque ad medium pilum aquae* and the stream of water flowing thereon; and since the other moiety of the river has not been shown to have been transferred by Government, it must be taken to be a river or stream of water belonging to Government.

In the natural course of things part of the latter stream must cross the moiety of the river bed assumed to belong to the Zemindar and flow down the Mobagam channel, and part of the water which reaches the respondents' land comes by direct or indirect flow from a river or stream belonging to Government from or through adjoining land, and is therefore chargeable (Act VII o 1865, Section 1 (*b*).)

The learned Judge from whose judgment this appeal brought based his decision upon the ground that the sannad w a grant of all rights vested in the Sovereign in respect of t Zemindari and its appurtenances except such as were expre

reserved thereby. Regulation XXV of 18(2 and the common form of sannad issued thereunder no doubt recognise that the Zemindars had formerly exercised certain sovereign rights over the territories under their control, and I think they show the intention of the British Government to curtail those rights. Even assuming that the Zemindars as petty chieftains exercised some form of sovereignty, it has not been shown that it assumed the form known in the West. As Sir H. S. Maine has pointed out, the idea of the Sovereign as proprietor was derived by the European jurists from Roman Law (see Ancient Law, 10th Edition 104 *et seq* : International Law p. 55); and the idea of sovereignty in India, more especially among such subordinate rulers as the Zamindars, was most probably that of a tax gathering Empire.

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The ryots grouped in villages were the possessors and cultivators of the soil under immemorial custom, and the right of the Zamindar was probably to extract as much of the produce of the soil as he could from them and from the tenants whom he planted upon the cultivable waste. Paragraph 13 of the sannad which reserves full legislative powers to the British Government introduces the European idea of " eminent domain " over the property of the members of the community, under which the Sovereign claims the power of disposing of everything contained within its territory for the general good, and seems to me to negative any intention to transfer " sovereign rights ". (See Hall, International Law, 6th edition, page 45). There is no evidence that the Zemindar in this particular case ever exercised any proprietary rights over the Vamsadhara river, or that as ruler he considered himself to possess such rights and the sannad itself contains no provision whatever with reference thereto.

I am of opinion that the plaintiffs have failed to prove that the Vamsadhara river is part of the Urlam Zemindari, and that from their own admission as to the property in the river at the date of the sannad as well as from the general presumption as to the rights appurtenant to the Zemindari, and the special presumption ow raised by Madras Act III of 1905, the river must be held to elong to Government, subject to the ordinary riparian rights and the special right of taking water through the Mobagam channel sing from its existence at the date of the sannad. I agree with lfield, J., that the general terms of Act VII of 1865 are not

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limited by the preamble. The plaintiffs' land is irrigated by water from a Government river, and I think that the burden is upon them to prove an "engagement" which entitles them to irrigation free of charge (Madras Act VII of 1865, S. 1 *(b)).* Such an engagement appears in the common form issued upon the Inam settlement which states the number of wet and dry acres claimed by the Inamdar. It appears from the plaint that the orginal grant under which the plaintiffs hold, specified the number of wet and dry acres, and that since the settlement 6 acres of the dry lands have been converted into wet, but it is not averred by what right or at what date this conversion was effected. It appears to me that the object of specifying in the original grant and at the Inam settlement the number of wet acres was to declare the extent of the grantee's rights of irrigation; that is, he was to be allowed to take only sufficient water to irrigate the number of acres described as wet.

The claim to irrigate for a second crop is in effect a claim to take water for double the number of acres specified in his grant, and I think that in order to substantiate the claim he should aver and prove his title.

I agree with the order proposed by my learned brother Oldfield, J.

By the Court :—The result is that the appeal succeeds and the plaintiffs' suit is dismissed with costs throughout.

PRIVY COUNCIL.

Present :—Lord Shaw, Sir George Farwell, Sir John Edge and Mr. Ameer Ali.

[On Appeal from the High Court at Allahabad.]

Buddha Singh and others ... *Appellants.* *

v.

Laltu Singh and another ... *Respondents.*

P. C.

Buddha Singh v. Laltu Singh.

Hindu Law—Mitakshara Law—Benares School—Paternal uncle's grandson and father's paternal uncle's son—Priority of former—Putra and synonymous terms used with brothers and uncles—Use in generic sense to be understood—Capacity to offer oblations—Ground of preference—Smriti Chandrika—Value in determining meaning of Mitakshara—Subodhini—Authority of—Harrington's view—Reference to Fu[ll] Bench when difference of opinion—Taking opinion of Judge not party to judgmen[t]

In the Mitakshara, as expounded in the Benares School, the word Putra and synonyms employed by Vijnaneswara in connection with brothers and uncles m[ay] be understood in a generic sense as in the case of the deceased owner and

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* 29th July 1915.

P. C.

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descendants in each ascending line up to the fixed limit, should be exhausted at any rate to the *third* degree before making the ascent to the line next in order of succession.

Under the Mitakshara (as interpreted by Mitramisra) whilst the right of inheritance arises from sapinda relationship or community of blood, in judging of the nearness of blood relationship or propinquity among the gotraja, the test to be applied to discover the preferential heir is the capacity to offer oblations.

Bhyah Ram Singh v. *Bhyah Ugur Singh* 1, followed.

Held, accordingly, that the paternal uncle's grandson was a preferential heir to the father's paternal uncle's son.

Devanda Bhatta, the author of the Smriti Chandrika, admittedly differs from the author of the Mitakshara in several essential rules of law and it is doubtful whether an enunciation in the Smriti Chandrika can be safely applied, except perhaps by way of analogy, to explain a dubious or indeterminate phrase or term in the Mitakshara.

No canonical authority can be attached to the rule laid down by Subodhini.

Quaere : if Harrington's view with the regard to the continuation of each line of heirs to the seventh degree can be accepted as it contravenes the rule of Manu.

It is usual where a difference of opinion arises in the same court to refer the point to a Full Bench and the law provides for such contingencies.

It is undesirable to introduce the opinion of a learned Judge who is not a party to the judgment for the purpose of enforcing the conclusion arrived at.

Appeal from a judgment and decree of the High Court at Allahabad dated July 6, 1912, affirming a judgment and decree of the Subordinate Judge of Moradabad, dated June 23, 1910.

The facts of the case have been sufficiently set forth in their Lordships' judgment.

DeGruyther, K. C., (with him *Dunne*) for the appellants contended that the whole question was what the Mitakshara said on the question of succession. In 1881 the Madras High Court in *Surayya Buktha* v. *Lakshmi Narasamma* 2, decided that paternal uncle's son came before brother's son. The Allahabad High Court in *Kalian Rai* v. *Ramchendra* 3, took the contrary view. The Madras High Court in *Chinnasami Pillai* v. *Kunju Pillai* 4 confirmed their former view of the law. In 1912 the matter came again before the Allahabad High Court. The Bombay decisions, *viz.*, *Rachava* v. *Kalingappa* 5, and *Kashibai* v. *Moreshwar Raghunath* 6, had nothing to do with the question. In Calcutta there was no decision on this point. The result was that Madras rulings were in direct conflict with Allahabad rulings. There was no authority for reading "son" as "grandson and great grandson".

1. (1870) 13 Moo., I. A. p. 372.
2. (1882) I. L. R. 5 M. 291.
3. (1902) I. L. R. 24 A. 129.
4. (1911) I. L. R. 35 M. 152 ; s. c. 21 M. L. J 856.
5. (1892) I. L. R. 16 B. 716.
6. (1911) I. L. R. 35 B. 389.

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In the Mitakshara 'son' did not include grandson; Subodhini, Apararka, and Vaijayanti are no authority on the Mitakshara. The former is a Commentary on Yajnavalkya.

Mr. Ameer Ali.—The whole law is from Yajnavalkya. Apararka is also a Commentary on Yajnavalkya.

Jolly dealing with Apararka said that certain matters peculiar to the Bengal School could be traced to Apararka whose view was to attach importance to oblations. This view was not accepted by the Mitakshara which was based upon propinquity. The Commentary by Nanda Pandita the author of Dattaka Mimansa, was directly opposed to the Mitakshara. Smriti Chandrika said that this Chapter was included by Subodhni.

Mr. Ameer Ali.—The whole question is as to who is the nearest sapinda. Harrington says that the construction of sapinda in Subodhini is general.

Reference was made to *Kureemchand Gurain* v. *Oodung Gurain* [1] *Ooshya Koer* v. *Nye Sookool* [2], *Bhyah Ram Singh* v. *Bhyah Ugur Singh* [3], and *Surayya Buktha* v. *Lakshmi Narasamma* [4]. The Mitakshara did not in terms provide for son and grandson, but on principle they were included. Brother's great grandson was not sapinda at all as he did not make the necessary offer.

(*Mr. Ameer Ali*, referred to *Rutcheputty Dut* v. *Rajendar* [5]) Harrington's view was clearly wrong.

Reference was made to Mit, Ch. II, Ss. 4 and 5; *Lullubhoy's case* [6], Mayne on Hindu Law, p. 27 28, and para, 504. Jolly's History of Hindu Law, P. 13. Mandlik P. 380. Viramitrodaya, Sec. 11.

Sir Robert Finlay, K. C., (with him *Dube*) for the respondents contended that as the rule in Sec. (5) referred to the descendants, it was absurd that three descents should not be taken from grandfather. The Madras cases showed that they were based on Mitakshara as interpreted in South India.

[*Sir Robert* was stopped in the middle of his argument and *DeGruyther* said that that he had already said what he had to say on the point and could add nothing to it.]

1. (1866) 6 W. R. 158.
2. (1870) 14 W. R. 208.
3. (1870) 13 M. I. A. 373.
4. (1882) 5 M. 291.
5. (1839) 2 M. I. A. 202, 205.
6. (1881) L. R. 7 I. A. 234.

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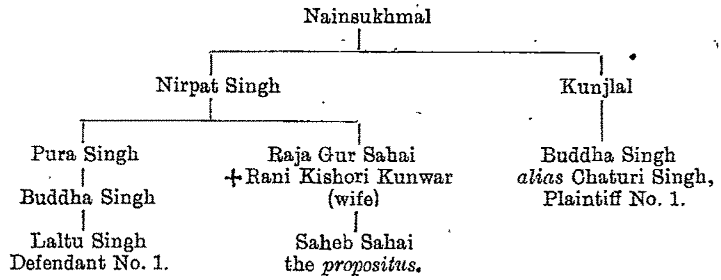
The judgment of their Lordships was delivered by

Mr. Ameer Ali.—The question for determination involved in this Appeal is one of considerable importance under the Hindu Law, and relates to the order of succession under the *Mitakshara* as expounded in the Benares School, among the collateral kindred belonging to the same paternal stock as the deceased.

The suit out of which the Appeal arises was brought by the Appellant Budha Singh *alias* Chaturi Singh to establish his right as the nearest reversioner to the estate of one Saheb Sahai, who died in 1873, without leaving any male issue. Saheb Sahai was a minor and unmarried at the time of his death; his mother, Rani Kishori Kunwar, who survived him, accordingly came into the possession of his estate, which she held for nearly 34 years. She died in 1907, when the succession opened to the male collaterals of Saheb Sahai.

The following genealogical table, on which both the courts in India have based their judgments, will explain the relative position of the parties to this action:—



The plaintiff, Buddha Singh, is thus the grandson of Nainsukhmal, the great-grand-father of Saheb Sahai, whilst the defendant Laltu is the great grandson of Saheb Sahai's grandfather, Nirpat, and the grandson of his paternal uncle, Pura. The plaintiff's contention is that under the law of the *Mitakshara* he has a preferential title to the inheritance of Saheb Sahai as against the defendant, who is admittedly in possession of the deceased's estate since Rani Kishori's death. He bases his right on the following text of the *Mitakshara*:—"On failure of the father's descendants the heirs are successively the paternal grandmother, the paternal grandfather, the uncles and their sons." [1] And he contends that the expression "sons" occurring in this verse must be strictly construed, and so construed, the

1. Colebrooke's translation, Chap. II. Sec. V, v. 4.

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devolution of the inheritance in Nirpat's line ceased with his grandson, Buddha, and did not come down to his great-grandson, the defendant Laltu, and that after Buddha, by virtue of the immediately following verse he, as the grandson of the great-grandfather of the deceased has become entitled to the estate. Their Lordships will refer presently a little more fully to this text and examine its meaning by the light of other texts.

Both the courts in India have held against the plaintiff's claim; hence this appeal to His Majesty in Council.

The learned Judges of the Allahabad High Court in two separate and able judgments have exhaustively reviewed the authorities bearing on the subject, and as their Lordships agree in the main with their deductions and the conclusion at which they have arrived on these deductions, they find themselves relieved of the necessity of discussing the law in any detail.

The *Mitakshara* of Vijnaneswara, who flourished about the end of the eleventh and the beginning of the twelfth century of the Christian era, purports to be a commentary on the Institutes of Yajnavalkya. Vijnaneswara analyses and discusses the text of his great predecessor, often at considerable length, explains the meaning of recondite passages, supplies omissions and reconciles discrepancies by frequent reference to other old expounders of the law. The best example of his treatment of Yajnavalkya's text is to be found in the commentary on the rule relating to the succession to the estate of a person who dies without leaving any male issue. After stating that the right of "sons, principal and secondary" to "take the heritage" had been already shown, he proceeds to quote the rule of Yajnavalkya declaring the order of succession in their default, which runs thus [1] :—"The "wife, and the daughters also, both parents, brothers likewise, and "their sons, gentiles, a pupil, and a fellow-student: on failure of "the first among these, the next in order is indeed heir of one who "has departed for heaven leaving no male issue. This rule extends "to all persons and classes."

Mr. Mandlik's rendering of these two slokas of Yajnavalky[a] is more literal and is as follows [2] :—

"The wife, daughters, both parents, brothers and likewise; their so[ns] "*gotrajas* (gentiles); *bandhus* (cognates); a pupil and a fellow-student. Of th[e] on failure of the preceding, the next following in order is heir to the estate o[f]

1. Mr. Colebrooke's translation of the Mitakshara, Chap. II, Sec. I,
2. Mandlik's translation of the Institutes of Yajnavalkya, p. 220, vv.

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"who has departed for heaven, leaving no *putra*. This rule extends to all (males "whether belonging or not to the four) classes."

The compound word *aputra*, occurring in Yajnavalkya's text has been rendered by Mr. Colebrooke as "leaving no male issue"; by Mr. Mandlik as "leaving no *putra*." He was evidently anxious to avoid any English synonym, as the word *putra* here, according to all the commentators, conveys a larger meaning than is usually implied by the term "son." The *Viramitrodaya* says clearly that the word "sonless," which is the literal equivalent of *aputra*, signifies "in default of son, grandson and great grandson," [1], that, in other words, it comprehends three degrees in the direct line of descent. In fact, it is not disputed at their Lordships' Bar that the word *putra* as used in relation to the last owner signifies and includes son, grandson, and great-grandson. What is contended for is that the same word in connection with other relatives, such as brother, uncle or grand-uncle, must be construed in a restricted and literal sense.

The Commentary of Vijnaneswara on the above-quoted slokas of Yajnavalkya, extends over several sections in Mr. Colebrooke's translation, and makes the work more a digest than a mere commentary. In Section I of Chapter II the author deals exhaustively with the right of the widow to inherit the estate of "one who has died *aputra*." Her right of succession is dependant on his leaving no male issue to the third degree. In paragraph 3 the word *putra* is used again in the same generic sense. After treating of the rights of daughters and parents in Sections II and III respectively, he deals in Section IV with the succession of brothers and "their sons." Here, again, the word *putra* is used, whether in the literal or in an extended sense is a matter for consideration.

Section V relates to the right of collateral kindred of the same paternal stock or *gotra*, and therefore called the *gotraja*, to take the inheritance of the *aputra* in default of "brothers sons." Admittedly both the plaintiff and the defendant are Saheb Sahai's *gotrajas*. Reference, therefore, is necessary to the rules embodied in Section V.

It is to be noted here that the word *putra* or more correctly *put-tra*, which lterally means "one who releases from hell (*put*)," is used by Vijnaneswara at the very beginning of his

1. Chap. III, part I, v. ii., Shastri Golap Chunder Sircar's translation, p. 154.

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Book on Inheritance. In para. 3, Section I, Chapter I, describing the two kinds of property (*daya*, wealth) to which rights of inheritance attach, *viz.*, the "unobstructed," and "obstructed," he speaks thus of the latter class :—

"but property devolves on parents (or uncles) and brothers and the rest, upon the "demise of the owner if there be no male issue, and thus the actual existence of a "son and the survival of the owner are impediments to the succession; and on "their ceasing the property dovolves [on the successor] in right of his being uncle "or brother. This is an inheritance subject to obstruction."

And then comes the significant passage:—"The same holds good in respect of their sons" and other descendants," meaning, clearly, the sons and *descendants* of uncles and brothers. And this is the construction which Balambhatta, one of the best known commentators of the *Mitakshara*, appears to have put on these words.

As pointed out in the case of *Ram Chandra* v. *Vinayak Venkatesh* [1], the right of collaterals to succeed to the inheritance of a deceased person is based on the rule of Manu, which has been translated differently by different writers, but which in substance amounts to this, that the estate of a deceased goes to his nearest *sapinda*. The right of collaterals, therefore, is dependant on the existence of the *sapinda*-relationship between the *propositus* and the claimant. It is now well settled by the decisions of this Board that under the *Mitakshara* [2] the *sapinda* relationship arises "between two people through their being connected by particles of one body," *viz.*, that of the common ancestor, in other words, from community of blood in contradistinction to the *Dayabhaga* notion of "community" in the "offering of religious oblations." But, as will be shown later on, the *Mitakshara*, whilst holding that the right to inherit does not spring from the right to offer oblations, does not exclude it from consideration as a test of propinquity or nearness of blood.

Mr. Colebrooke has, in his translation of Section V, erroneously rendered the word *sapinda* as "relations connected by funeral "oblations," and *samanodakas* as those connected by "libations of water," which has led to some confusion of ideas Their Lordships, therefore, propose to follow the translation which was before this Board in *Lullubhoy's* case.

1. (1914) L. R. 41 I. A. 290. s. c. 27 M. L. J. 383.

2. *Lullubhoy Bappoobhoy* v. *Casibai and others*, (1880) L. R. 7, I. A. 214, *Ramachandra Martand* v. *Vinayak Venkatesh.*

The first paragraph stands thus: "If there be no brother's sons *gotrajas* share the estate. *Gotrajas* are the paternal grandmother and *sapindas* and *samanodakas*." P. C. Buddha Singh v. Laltu Singh. Mr. Ameer Ali.

Their Lordships understand that the word rendered "sons" in this paragraph is *putra* in the original. Then follows paragraph 2, in which Vijnaneswara develops the position of the grandmother in the following terms:—

"In the first place the paternal grandmother takes the inheritance. The "paternal grandmother's succession immediately after the mother was seemingly "suggested by the text before cited. 'And the mother also being dead, 'the "father's mother shall take the heritage'" (Section 1, paragraph 7). No place, "however, is found for her in the compact series of heirs from the father to the "nephew, and that text ('the father's mother shall take 'the heritage') is inten-"ded only to indicate her general competency for inheritance; she must, therefore, "of course, succeed immediately after the nephew; and thus there is no contradic-"tion."

Para. 3 then states in general terms that after the grandmother the *sapindas* of the same paternal stock, *viz.*, "the pater-"nal grandfather and the rest inherit the estate, for *bhinnagotra* "*sapindas* (i. e. *sapindas* belonging to another stock are indicated "by the term *bandhu* " (dealt with in Section VI).

Paras. 4 and 5 deal specifically with the succession of the *samanagotra sapindas* and run as follows:—

"(4) Here on failure of the father's *descendants* the heirs are successively "the paternal grandmother, the paternal grandfather, and their sons."

"(5) On failure of the paternal grandfather's line, the paternal great-grand-"mother, the great-grandfather, his sons and their *issue*, inherit. In this manner "must be understood the succession of the *Samanagotra sapindas*."

It is clear from the observations of both Mr. Mandlik and Dr. Jolly [1], that Mr. Colebrooke in his translation of para 5 has omitted towards the end the important words "up to the seventh," which makes a material difference in the sense of the passage.

Mr. Mandlik translates the last sentence as follows: "In this manner up to the seventh [*sapinda*] the taking of wealth by "the *samanagotra sapindas* should be known." Only instead of "the expression *samanagotra*, which is in the original, he uses the abbreviated term *sagotra*.

Para. 6 then provides as follows:—

"6. If there be none such, the succession devolves on *samanodakas*, and they "must be understood to reach the seven degrees beyond *sapindas*, or else as far as "the limit of knowledge and name extend. Accordingly Vhrat Menu says: "'The relation of the *sapindas* ceases 'with the seventh person, and that of "'*samanodakas* extends to the fourteenth degree, or as some affirm, it 'reaches as "'the memory of birth and name' extends.' This is signified by *gotra*."

1. Mandlik's Hindu Law, p. 379; Dr. Jolly's Tagore Law Lectures, p. 124.

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It is contended on behalf of the appellant on the strength of these several passages that the word "son" used in conjunction with brothers must be literally construed, for otherwise, it is urged, the position assigned to the grandmother in the order of succession would be displaced. The effect of this argument (which by parity of reasoning must apply also to uncles), if well founded, is that the succession in the father's or grandfather's line must cease *ipso facto* on the failure of decendants of the second degree, and the inheritance must be diverted to another line ascending first to the female ancestor.

In their Lordships' opinion it begs the very question which they have to determine, *viz.*, in what sense Vijnaneswara has used the term "son" in these passages; and that question can be answered only first by examining his own method of employing the word, and secondly, by inquiring in what sense other Hindu jurists of the same school or cognate schools have understood the expression. Before proceeding with their examination of Vijnaneswara's own words, their Lordships desire to make one observation, as it strikes them, regarding the place of the grandmother in his scheme of succession.

In Yajnavalkya's rule, already quoted, to which Vijnaneswara refers as "the compact series of heirs," the paternal grandmother is not included as an heir. Vijnaneswara finds a place for her among the *gotraja*, on the authority of an enunciation of Manu, which he quotes in para. 7 of Section I, Chapter II, and which runs thus: "Of a son dying childless the mother shall take the "estate; and the mother also being dead, the father's mother "shall take the heritage."

According to Manu, then, if his words are to be literally construed, the paternal grandmother would take immediately after the mother. This difficulty Vijnaneswara himself recognises; in order to reconcile the conflict between Yajnavalkya, who omits the grandmother altogether from his "compact series of heirs," and Manu, who would place her directly after the mother, he places her somewhat arbitrarily, as Messrs. West and Buhler also indicate, after the "brother's sons." The question, however whether he intended his declaration to be imperative can be solved only by a less free translation than Mr. Colebrooke's. Anyhow, the meaning to be attached to the word "sons" is left subject to explanation.

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Now, in paragraph 1 of Section V, where Vijnaneswara says "if there be not even "brother's sons," the word used is *putra*; in paragraph 2, where the grandmother's place is declared, the expression employed is brother's *suta*, a synonym of *putra*. In paragraph 4 again the word *putra* appears to be used in connection with uncles. In paragraph 5, where the expression "his sons and their issue" occurs, the original words are said to be *tat putras*, "his sons," and *tat sunavas*, [1] "their sons."

The word "descendants" in Mr. Colebrooke's translation is in the original "*santana*," which means race, lineage, or posterity, and is still used among Hindus to mean male progeny without limitation. Mr. Justice Telang construes it as meaning "continuation"; *Rachana* v. *Kalingappa* [2], other learned Sanscritists interpret it to signify "an uninterrupted series" [of progeny or heirs]. Their Lordships have no doubt that Vijnaneswara has used it in the sense of lineal male descendants. *Sunavas*, translated by Mr. Colebrooke as "issue", connotes the same idea.

Having regard to the fact that this great legist, whose logical acumen judging from his work seems to have been remarkable, has used the term *putra* in previous parts of his book on inheritance in a comprehensive and generic sense, their Lordships find it difficult to conceive why he should arbitrarily and without any explanation have used the word towards the end in quite a different and restricted sense, or why, if his intention was to confine the descent in the case of the collaterals to the actual sons of brothers and uncles, he did not employ terms which would have exactly conveyed his meaning, such as *atmaja* or *auras*, which, their Lordships understand, mean "son of one's loins [3]." Nor can their Lordships appreciate the argument that the meaning of such words as *santana* and *sunavas*, which mean lineal male progeny without limitation, should be arbitrarily cut down to two degrees.

There seems to be great force then in Sir Robert Finlay's contention that the limitation is to be found elsewhere. The rule of Manu supplies one limitation:—"To three (ancestors) water must be offered, to three funeral cake is given, the fourth

1. Plural of *sunu* "offspring"—*Sunu* is the old Indo-Aryan word which survives in the English "son."

2. (1892) I.L.R. 16 Bom., p. 716.

3. See Mandlik, p. 380; and Sutherland's transl of the *Dattaka Mimansa*, (Stoke's Hindu Law Books, p. 547).

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"(descendant is) the giver of these (oblations), the fifth has no "connection with them [1]." The other is deduced by Mr. Harrington See *Rutcheeputy Dutt Jha* v. *Rajunder Natrain Rae* [2], the well known author of the "Analysis," and one of the most erudite judges of the old Sudder Court of Bengal, from the enunciations of Vijnaneswara himself in paragraph 6, Section V, where he declares that the succession of the *samanagotra sapindas* extends "in this manner" to "the seventh degree." It is not necessary in their Lordships' opinion to examine the force of the criticism that has been levelled at Mr. Harrington's construction of Vijnaneswara's dictum, for if the view based on Manu's doctrine or rule be well-founded, as the High Court has considered it to be, it would be sufficient to dispose of this appeal.

In this connection their Lordships desire to make another observation. If it be correct, as has been suggested, that the words *putra-pautra* ("son-grandson") used by Vijnaneswara in Section I, Chapter I, did not comprehend originally a great-grandson, but that it has been included by the commentators, as the *Viramitrodaya* shows, on the strength of analogical reasoning, then, in their Lordships' opinion, the objection to the High Court's reading of the text, based on the necessity of strict adherence to a literal interpretation, loses considerably its force, and the Courts are compelled to resort to other texts to extract the meaning of undefined expressions.

Turning now very briefly to the other authorities to which their Lordships' attention was called, they observe that Apararka, another scholiast of Yajnavalkya, who flourished about a century later than Vijnaneswara, dealing with the same text, on which the author of the *Mitakshara* has commented at such length, construes, as pointed out by the High Court, the expressions "brother's sons" and "uncle's sons" in a wider sense. That Apararka's authority is acknowledged by the expositors of the Benares School is clear from the fact, to which Mr. Mandlik refers, that Visweswara Bhatta, the author of the *Subodhini*, a commentary on the *Mitakshara*, has used Apararka's work among others for the compilation of his *Madanaparijata*. Parts of Apararka's treatise and of the *Madanaparijata* have been translated by Dr. Sarvadhikari and are to be found in his Tagore Lectures for 1880.

1. "Sacred Books of the East," Vol. XXV., v. 186, p. 36.
2. (1829) 2 Moore's I. A., p. 153.

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Nanda Pandita, "an esteemed writer of "the Benares School," and the author of the noted work on the Law of Adoption, called the *Dattaka Mimansa*, a standard treatise among the followers of the *Mitakshara*, has written commentaries both on the *Mitakshara* as well as on the Institutes of Vishnu, a predecessor of Yajnavalkya, who is frequently quoted by Vijnaneswara. In this latter work, called the *Vaijayanti*, in giving the order among the *sagotras*, he states that "in the father's line, on the failure of the brother's son, the brother's "son's son is heir." And he bases this rule on the prescriptions of Manu already quoted. It is to be noted that this writer, who must have had Vijnaneswara's words in his mind, certainly did not limit the term *putra* to two degrees. Varadaraja, whose authority is said to be great in Southern India, and whose enunciations appear to be received with respect also by the expounders of the Benares School, has given expression to the same view. *Vidyabhusan* Shama Charan Sarkar, a learned Hindu scholar who for many years held the post of principal Oriental Interpreter in the High Court of Calcutta, and at one time occupied the chair of Tagore Law Professor in the Calcutta University, also deals with the subject in his well-known work called the *Vyavastha Chandrika*.

This learned Hindu writer states in Principle 153 that "a brother's grandson "succeeds in default of a brother's son," and refers to the decision of the Calcutta High Court in *Kureemchand Gorain* v. *Oodung Gorain* [1], without taking any exception to its correctness. In the note to the Principle he stated the reason why the brother's grandson succeeds on failure of a brother's son in these words: "Because the term brother's son is inclusive also "of the brother's grandson, and because he is *sapinda* and the "nearest of the persons understood by the term *gotraja*." The significance, however, of the statement lies in the question which Shama Charan Sarkar propounds in the footnote: "It may be "asked that when in law the term 'son' (*put-tra*) is inclusive of "the grandson and great-grandson, why then the term 'brother's "son" does not include also the 'brother's great-grandson'?" The answer which he gives to his own question is both interesting and instructive. "The answer is, " he says, "that in law "calculation is made from the son of the common ancestor,

1. (1866) 6 W. R. p. 158.

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"which here is the father of both the deceased and his brother, "consequently the term 'son (of that ancestor) is inclusive of his "great-grandson, who is the brother's grandson."

Dr. Raj Comar Sarvadhikari whose authority as an expounder of the Hindu Law has been recognised by the Calcutta High Court and this Board, in his Tagore Law Lectures gives emphatic expression to the view that the word "son" includes three degrees of descendants.

Devananda Bhatta, the author of the *Smriti Chandrika*, whose doctrines, however, are not recognised in Northern India, holds the contrary opinion; and Visweswara Bhatta in the *Subodhini* certainly appears to say that the father's line ceases with the brother's son; and probably the same meaning is to be attached to his statements in the *Madanaparijata*. With regard to these two writers, their Lordships deem it necessary to observe that Devananda Bhatta, who is supposed to have been a contemporary of Apararka, admittedly differs from the author of the *Mitakshara* in several essential rules of law. It seems, to say the least, doubtful whether an enunciation in the *Smriti Chandrika* can be safely applied, except perhaps by way of analogy, to explain a dubious or indeterminate phrase or term in the *Mitakshara*. The *Subodhini* stands on a different footing; it no doubt professes to be a commentary on the *Mitakshara*, but it is equally clear that in several instances it diverges from the acknowledged interpretations of its doctrines. The views of Visweswara Bhatta and Devananda Bhatta have been propounded with much force by Mr. Mandlik and Golap Chunder Shastri, both of whom take their stand on the literal construction of the word *putra*. This thesis has been elaborately worked out by the former writer, but in substance it amounts to this, that as Vijnaneswara has used the expression "son" in conjunction with "brothers" and "uncles" it must be restricted to their direct male issue, and no extension of its meaning is permissible.

Their Lordships agree with the High Court of Allahabad that this reasoning proceeds on a very narrow basis and materially ignores the chief ground on which the opposite doctrine is based. Dr. Raj Comar Sarvadhikari's construction appears to them to rest on a logical foundation, and his views seem to be consistent and clear. In effect he says that the *Mitakshara* propounds a definite scheme of succession; lineal male descendants of the

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deceased owner down to and including the third degree, who constitute the first class of propinquous relations (the nearest *sapindas*) inherit in succession in the first instance. In their default the widow and daughter take by express provision of the law. The daughter's son comes in similarly. In their absence the inheritance ascends; each ascending line begins with a female, and each has to be exhausted in accordance with the rule of propinquous *sapinda*-relationship before the next in order can take; so that the parents and "their three successive descendants" take first; then the paternal grandmother and the paternal grand-father, and "their three successive descendants" come next, and so on.

It may be noted here that two recent Hindu writers of repute, [1] and Dr. Jolly, who was at one time Tagore Law Professor in the Calcutta University, and is one of the translators of "The Sacred Books of the East," are in substantial agreement with Dr. Raj Comar Sarvadhikari.

As regards the decided cases there seems to be a conflict of opinion between the High Courts of Allahabad and Calcutta on one side and that of Madras on the other. The latter High Court has upheld the narrow construction propounded by the *Smriti Chandrika* and the *Subodhini*, and though it purports to confine its interpretation to Southern India, the opinion it has expressed has a wider application and deserves, therefore, careful attention.

Their Lordships do not consider it necessary to refer to the earlier decisions of the Sudder Dewanny Adalut of the North-West Provinces; they think it sufficient to treat the judgment of Mr. Harrington in *Rutcheeputty Dutt Jha* [2], as a starting point in the current of decisions in Northern India. The question at issue in that case related to the right of *bandhus* or cognates under the *Mitakshara* to the succession to a deceased person in the presence of a *gotraja*. Mr. Harrington in dealing with the question examined exhaustively the meaning of the word *putra*, and came to the conclusion that it had been used by Vijnaneswara in a generic sense. His Judgment was affirmed on appeal to his Board; and there appears to be no challenge of his interpretation of the law. It again received the approval of this Board in *Bhyah Ram Singh* v. *Bhyah Ugur Singh* [3], Perhaps Mr.

1. Dr. Jogendra Nath Bhuttacharjea, M. A., D. L., in his commentaries on the Hindu Law, p. 444; Mr. Jogendro Chunder Ghose, Hindu Law, p. 119.
2. (1829) 2 Moo., I. A., p. 153.
3. (1870) 13 Moo., I. A., p. 373.

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Harrington's view with regard to the continuation of each line of heirs to the seventh degree is open to the objection that it contravenes the rule of Manu. As already observed, their Lordships do not, however, consider it necessary for the purposes of the present case to consider whether the principle suggested by him is correct or not.

In *Kureem Chand Gorain* v. *Oodung Gorain* 1; also the exact point in issue was not identical with the one involved here, but Mr. Harrington's construction of the word *putra* was accepted; and it was held that in the scheme of the *Mitakshara*, the term "brother's son" includes "brother's grandson."

In *Kalian Rai* v. *Ram Chunder* 2, the point at issue directly concerned the position of the brother's grandson in the line of descent, and the learned Judges of the Allahabad High Court (Burkett and Chamier, JJ.) came to the conclusion that under the law of the *Mitakshara*, as accepted and expounded in the Benares School, the brother's grandson had the right of succession to the deceased before it ascended to the second line, *viz.*, the grand-paternal line.

This decision has been followed in the case under appeal.

In the Bombay Presidency also the doctrines of the *Mitakshara* are recognised subject to the interpretation of the *Vyvahara Mayukha* of Nilkantha Bhatta, and although on many points there is considerable divergence between the Benares and Maharashtara Schools, as regards the question involved in the present case, one decision at least of the Bombay High Court indicates an agreement with the Allahabad High Court.

Mr. Justice Telang, a Sanscritist of high order, in *Ranchava* v. *Kalingapa* 3, explains thus the order of descent among the *gotrajas* (enunciated in Chapter II, Section V, paragraph 4-5 of the *Mitakshara*), although, as he points out, each ascending line begins with a female (*gotraja*) ancestress.

"In the Mitakshara, Chapter II, Section V, pl. 4-5, it is laid down, that the "propinquity of *gotrajas* is to be determined by lines of descent—that is to say, the "inheritance is to go first in the line" (the word in the original is *santana* literally "continuation") "of the paternal grandfather, then in default of any one in that "line, of the paternal great-grandfather, then of the paternal great-great grand-"father, and so forth." . . .

1. (1866) 6 Cal. Weekly Reporter (1866), p. 158.
2. (1902) I. L. R., 24 All., 128.
3. (1892) I. L., 16 Bom., 716.

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The Madras High Court in two cases, named respectively *Suraya Bhukta* v. *Lakhshminarasamma* [1], and *Chinnasami Pillai* v. *Kunia Pillai* [2], has held, as already stated, the direct opposite. The *ratio decidendi* in both judgments, which are elaborate and closely reasoned, is of a two-fold character; in the first place the learned judges say that when a word purports to bear two meanings, one primary, the other secondary, it must be understood in the primary sense unless there is anything in the context to show that it was not used in that sense. In the second place they seem to consider the opinions of Devananda Bhatta and of Visveshwara Bhatta in the *Smriti Chandrika* and *Subodhini* respectively as conclusively showing that the *Mitakshara* must be taken to limit collateral descent to two degrees in each line. Their Lordships have already made their remarks on these two authorities; they do not feel disposed to attach any canonical authority to the rule of the *Subodhini*. Curiously enough there is no reference in either of the Madras judgments referred to above to a previous decision in *Parasara Bhattar* v. *Rangaraja Bhattar* [3], of the same court to which Turner, C. J., was also a party. In that case the rule of the *Smriti Chandrika* was not accepted nor was the literal construction of the *Mitakshara* followed. It is usual in such cases where a difference of opinion arises in the same court to refer the point to a Full Bench, and the law provides for such contingencies. Had that course been followed their Lordships would probably have had more detailed reasoning as to the change of opinion on the part at least of one judge.

In *Suraya Bhukta* the judges say they had consulted their "learned colleague, Mr. Justice Muttusami Ayyar," and acknowledged their obligations to him for his assistance. Their Lordships cannot help remarking that it is an undesirable course, which has not been approved of by this Board, to introduce the opinion of another judge not a party to the judgment for the purpose of enforcing the conclusion arrived at. The recorded opinion of Muttusami Ayyar, J., would have been of great use had he been associated in the decision.

However, the two Madras decisions have received the respectful consideration of their Lordships. They have already given

1. (1881) I. L. R., 5 Mad., 291.
2. (1910) I. L. R., 35 Mad., 152. s. c. 21 M. L. J. 856.
3. (1880) I. L., 2 Mad., 202.

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reasons for holding that in the *Mitakshara*, as expounded in the Benares School, the word *putra* and its synonym employed by Vijinaneswara in connection with brothers and uncles must be understood in a generic sense as in the case of the deceased owner, and that the descendants in each ascending line, up to the fixed limit, should be exhausted at any rate to the *third* degree before making the ascent to the line next in order of succession.

It seems to their Lordships that there is another ground on which the plaintiff must fail. It is admitted that the defendant confers greater benefit on the deceased by the offerings he makes to the *manes* of the common ancestor. Now, it is absolutely clear that under the *Mitakshara*, whilst the right of inheritance arises from *sapinda*-relationship, or community of blood, in judging of the nearness of blood-relationship or propinquity among the *gotraja*, the test to be applied to discover the preferential heir is the capacity to offer oblations. Mitra Misra, the author of the *Viramitrodaya* [1], an authoritative commentary on the *Mitakshara*, lays down this doctrine in express terms. He says, " when there "are many claimants to the heritage among *gotrajas* and the " like [2], then the fact of conferring benefits on the proprietor of "the wealth by means of the offering of oblations and the like "only excludes those that do not confer such benefits." Dr. Raj "Comar Sarvadhikari renders the last part of this passage thus : " The benefit conferred on the late owner by the offering of the " cake and the water determines the title to inheritance [3]."

In the case of *Bhyah Ram Singh* v. *Bhyah Ugur Singh* [4], the Board affirmed this rule in the following words : "When a " question of preference arises, as preference is founded on " superior efficacy of oblations, that principle must be applied " to the solution of the difficulty. "

For these considerations their Lordships are of opinion that the conclusion arrived at by the High Court is well founded, and this appeal should be dismissed with costs. And they will humbly advise His Majesty accordingly.

Solicitors for appellants :—*Ranken Ford, Ford and Chester*.

Solicitors for respondents :—*Pyke, Parrot & Co.*

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1. Golap Chunder Shastri's translation, p. 91, Chapter II, Part I, s. 23 A.

2. Dr. Raj Comar Sarvadhikari construes the word "like" as meaning " other classes of heirs."

3. Tagore Law Lectures," for 1880, p. 629.

4. (1870) 13 Moore's Ind. Appeals, p. 373.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Oldfield and Mr. Justice Tyabji.

Trusi Deva Rao *alias* Ananthaya, ... *Appellant* (Creditor.)*

v.

Pandit Parameshraya and another ... *Respondents.*

Deva Rao v. Pandit Parameshraya.

Provincial Insolvency Act III of 1907, *Ss.* 46, 6, *sub sec.* 4 (c)—*Appeal—Parties—Presentation of a creditor's petition in the District Court after the prescribed time—Presentation within time in a Court not having jurisdiction—Validity of—Limitation Act, S.* 14.

In an appeal under S. 46 of the Provincial Insolvency Act, only parties directly affected by the appeal are entitled to notice.

In re A Debtor (1901, 2, K. B. 354) followed.

Held, accordingly, in an appeal against an order of adjudication by one of the creditors, that notice to creditors other than those on record was, in the absence of special circumstances unnecessary.

S. 14 of the Limitation Act, does not apply to cases under the Provincial Insolvency Act.

Where a creditor presented an insolvency petition within 3 months of the act of insolvency in the Sub-Court which had no jurisdiction to entertain the petition, and on the petition being returned for presentation to the proper Court presented it in the District Court, when more than 3 months had expired from the act of insolvency, *Held* that the petition was out of time.

Appeal from the order of the District Court of South Canara, in Insolvency Petition No. 3 of 1912.

B. Sitarama Rao, for appellant.

H. Balakrishna Rao, for respondent.

The Court delivered the following

Judgment:—A preliminary objection has been taken by the respondent that the hearing cannot proceed, because no notice of the appeal has been given to the creditors, other than himself. S. 46 of the Provincial Insolvency Act, specifies the class of persons entitled to appeal. But no provision specifies those entitled to be made or whom the appellant is obliged to make respondents, and we can obtain no indirect guidance on the point by inference from other parts of the Act. For it is not possible to hold that other creditors of the insolvent, whether named or not named in the petition and whether they have appeared at the adjudication proceedings or not, are necessarily parties, to whom general or special notice of the appeal should issue. We decide to follow the English Procedure stated in the English Order 58, Rule 2 (1)

* A. A. O. No. 319 of 1912. 23rd October 1914.

Deva Rao v. Pandit Parameshraya.

(*vide* also *In re A Debtor* [1],) and to hold that only parties directly affected by the appeal are entitled to notice. It has not been shown that any special circumstances exist in consequence of which other creditors than those already on the record can be supposed to be so affected. We therefore disallow the preliminary objection.

On the merits the learned District Judge was wrong in holding, as we understand him to have done, that the date of presentation of the petition was the date on which it was erroneously filed in the Subordinate Court before it was filed in the District Court. He could do so only with reference to S. 14 of the Limitation Act; and it has been decided by this Court in *Doraisami Aiyengar* v. *Minakshi Sundaram Aiyar* [2], that the Limitation Act is not applicable to proceedings under this Act. As the petition can be treated as having been presented on the date of its presentation in the District Court, it has not been presented in conformity with S. 6 of the Provincial Insolvency Act within three months of the Act of Insolvency alleged in it. It is therefore liable to dismissal. The appeal is accordingly allowed, the petition being dismissed with costs as between the appellant and the 1st respondent in both courts. The 2nd respondent, the Insolvent, will bear his own costs throughout.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Spencer and Mr. Justice Kumaraswami Sastri.

Mailthi Hengsu and another ... ... *Appellants.*

v.

Soma and three others ... ... *Respondents.*

Mailthi. Hengsu v. Soma.

Mulgeni—Prohibition against alienation—No right of re-entry reserved—Agreement to surrender if land not required—No compulsion to surrender—Act V of 1884—*Lease silent as to payment of cesses by tenant—Landlord's right to recover half th cess from the tenant.*

Alienation of land by a Mulgeni tenant, who had agreed to enjoy the la without alienating it and to relinquish it if not required by him, does not indic a desire to relinquish the land. Such a clause does not work a forfeiture.

Parameshri v. *Vittappa Shanbogha* [3], referred to.

Act V of 1884 does not restrict the landlord's right to half the cess from tenant to cases where the lease deed contains a provision to that effect.

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* S. A. 441 of 1913. 3rd August 1915.

1. (1901) 2 K. B. 854. 2. (1914) 16 M. L. T. 246.

3. (1902) I.L.R. 26 M. 157.

Mailthi Hengsu v. Soma.

Second appeal from the decree of the District Court of South Canara in A. S. No. 133 of 1911, preferred against the decree of the District Munsiff of Puttur, in O. S. No. 289 of 1910.

Suit for arrears of rent and for half the cesses paid by the plaintiffs on the land and for a declaration that the sale deed in respect of the plaint land by the father of 2nd defendant in favour of the 3rd defendant was void as against the plaintiffs and for recovery of possession of the property on payment by plaintiffs of the value of the improvements effected. Both the Courts dismissed the suit for possession on the ground that the lease did not contain a provision for re-entry. The claim for cesses was disallowed on the ground that the parties had not provided for its payment in the lease.

H. Balakrishna Rau for the Appellants.—The suit is not for recovery of possession on the ground of forfeiture for breach of covenant against alienation. It is based on the independent condition to surrender the land if *not required* by the tenant himself. It is to specifically enforce this condition. The sale by the tenant is a declaration that he does not require the land. The lease in this case is distinguishable from the lease in *Parameshri* v. *Vittappa Shanbhaga* [1]. There the tenant bound himself to *sell* the improvements to the landlord alone if he relinquished the land. He was not bound to surrender; there the tenant binds himself to surrender the land if he does not require the land. The clause is a condition as distinguished from a covenant, 12 Q. B. 244.

The right to half the cess is conferred by the Act V of 1884 and unless there is an agreement not to claim, is enforceable.

B. Sitarama Rau for the Respondents.

The Court delivered the following

Judgment:—It is first contended that the landlord can compel the tenant to surrender the land on the strength of the following clause in the lease deed (Exhibit A).—"If while without alienating the land in any manner I am enjoying the said land through posterity I find that I do not require the said land I shall relinquish the land to you and obtain from you the value of the improvements which I have made thereon."

In our opinion this clause does not work a forfeiture but is rather intended to secure for the tenant a right to relinquish his

1. (1902) I. L. R. 26 M. 157. s. c. 12 M. L. J. 189.

Mailthi Hengsu v. Soma.

holding at his option. In fact the case in which the tenant alienates the land is in terms excluded from the conditions upon which he is allowed to relinquish it. The landlord therefore, cannot rely on the fact that the land has been alienated as indicating a desire to relinquish and thus work the clause to the tenant's disadvantage when forfeiture does not follow from the act of alienation. We do not see any material distinction between this case and that dealt with in *Parameshri* v. *Vittappa Shanbhoga* 1.

The second contention which is that the landlord is entitled to recover half the landcess from the tenant is a good one. Madras Act V of 1884 does not restrict this right to cases in which the lease deed contains a provision to that effect.

We modify the decree by allowing Rs. 4-11-6 disallowed by the lower Courts and in other respects we dismiss the second appeal with costs.

Decree modified.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Srinivasa Aiyangar.

Samu Pathan ... ... *Petitioner* (Plaintiff).*

v.

Chidambara Odayan ... ... *Respondent (Defendant.)*

Samu Pathan v. Chidambara Odayan.

Transfer of Property Act, S. 55 (2)--Mortgage-Debt transfer of—Covenant for title, if implied—Breach—Damages—Cause of action—Limitation Act, art. 116.

In the case of a transfer of a mortgage-debt there is no implied covenant for title so as to entitle the transferee to damages from the transferor, in case the security fails for want of title in the mortgagor.

The cause of action for a suit for damages for breach of a covenant for title in the case of a conveyance, arises on the date of the execution of the conveyance.

Petition under S. 25 of Act IX of 1887, praying the High Court to revise the decree of the Court of the Subordinate Judge of Mayavaram in S. C. S. No. 1805 of 1913.

The plaintiff obtained the transfer of a hypothecation-bond from the defendant by a registered sale-deed on 20-6-1906. Subsequently, he instituted O. S. No. 326 of 1906, on the file of th[e] Court of the District Munsif of Tiruvalur, against the mortgag[or] and his representatives, for recovery of the amount of the bon[d]. The plaintiff obtained a decree for the sale of the hypotheca. O[n] appeal, the District Judge held that the properties purported to have been hypothecated, did not belong to the mortgagor and

* C. R. P. 884 of 1914. 5th August 1915.
1. (1902) I. L. R. 26 M. 157. s. c. 12 M. L. J. 189.

were not liable to be sold in execution of the plaintiff's decree in O. S. No. 326 of 1906. On 19-10-1910, the High Court, on second appeal confirmed the decree of the District Court and dismissed the plaintiff's suit. On 11-10-1913 the plaintiff instituted Small Cause Suit No. 1805 of 1913, on the file of the Mayavaram Sub-court, against the defendant, for damages for breach of warranty of title. The cause of action was alleged in the plaint to have arisen on 19-10-1910, the date of the High Court's decree. The Subordinate Judge dismissed the plaintiff's suit.

A. V. Visvanatha Sastri for *G. S. Ramachandra Iyer* for petitioner.

A simple mortgage constitutes the transfer of an interest in immoveable property. (See S. 58 of the Transfer of Property Act. *Appasami* v. *Scott* [1] and *Swami Iyer* v. *Krishnaswami* [2].) The plaintiff is the transferee of that interest. He has the legal title. (See art. 134 of the Limitation Act). In every case of a transfer of immoveable property there is a statutory covenant for title. See S. 55 (2) of the Transfer of Property Act. This is so even where the transferee is aware of the defect in the vendor's title. *Subbaraya* v. *Rajagopala* [3] and *Arunachella* v. *Ramaswami* [4]. The defendant had himself no right to proceed against the hypotheca. He is therefore bound to compensate his vendee for the loss.

K. S. Jayarama Iyer for the Respondent.

The transfer in this case is only of the debt secured by the mortgage-bond. In effect it is a transfer of moveable property. *Muniappa* v. *Subramania* [5] and *Nataraja Iyer* v. *Subbiah Iyer* [6]. Under the English Law a mortgagee's interest is classed as personal property. See Ghose on Mortgages, pp. 71 and 72. There is no damage to the plaintiff as he could have proceeded against the person of the mortgagor in the prior suit.

The Court delivered the following

Judgment:—The plaintiff obtained an assignment of a ortgage-debt from the defendant and sued the mortgagor for e mortgage amount. That suit was dismissed on the ground at the mortgagor had no title to the mortgaged properties. Why the plaintiff did not obtain a personal decree against the mortgagor is not explained. The plaintiff brought the present

1. (1884) I. L. R. 9 M. 5.
2. (1886) I. L. R. 10 M. 169.
3. (1914) M. W. N. 376.
4. (1914) 27 M. L. J. 517.
5. (1895) I. L. R. 18 M. 487.
6. (1911) 22 M. L. J. 105.

Samu Pathan v. Chidambara Odayan.

action in the Small Cause side of the Sub-Court, Mayavaram, to recover damages for an alleged breach of a covenant for title. The 1st Court dismissed the suit and this application is to revise the decree of the first Court. Plaintiff contends that the mortgage is an interest in immoveable property; that the transfer was a sale of immoveable property and by virtue of S. 55 of the Transfer of Property Act, the defendant should be deemed to have contracted that the interest which he professed to transfer subsisted.

A charge on land is undoubtedly an interest in immoveable property, and I will assume though there is a difference of opinion on this point, that for the transfer of such a charge, the formalities required for the sale of immoveable property should be complied with. See *Ramasami Pattar* v. *Chinnan Asari* [1]; *Subramanian* v. *Perumal Reddi* [2]; and Sec. 8, Transfer of Property Act; Ghose on Mortgage, page 72 (note). But I am not prepared to hold that there is an implied covenant for title on a transfer of a mortgage debt. A transfer of a mortgage can hardly be regarded as a transfer of ownership of immoveable property. What is sold is primarily not the charge but the debt (*Subramanyam* v. *Perumal Reddi* [2],); and the rights of such a transferee are practically the same as those of a transferee of an actionable claim though a mortgage-debt is not an actionable claim as defined in the Transfer of Property Act. In a transfer by way of mortgage there is implied a covenant for title and the transferee of a mortgage gets the benefit of this covenant. (See S. 65, clause (*a*) of the Transfer of Property Act). My attention has not been drawn to any case, Indian or English, in which such a covenant was implied; on the other hand the case of *Marnham* v. *Weaver* [3], seems to assume that there is no such covenant. I agree with the Lower Court that the plaintiff has no cause of action against the defendant. Further the suit appears to be barred by limitation as the cause of action for a suit fo[r] damages for breach of a covenant for title arises on the executio[n] of the conveyance. As however the question was not argu[ed] before me, I do not desire to express any final opinion on th[e] question. I dismiss the petition with costs.

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1. (1901) I. L. R. 24 M. 449. 2. (1894) I. L. R. 18 M. 454.
3. 80 L. T. 412.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Oldfield and Mr. Justice Sadasiva Aiyer.

Sri Rajah Inuganhi Venkata Raja Gopala Surya Row Bahadur. ... *Appellant* * *(1st Defendant and Respondent).*

v.

K. Basivi Reddi. ... *Respondent (Plaintiff and Petitioner).*

Venkata Raja-Gopala Surya Row Bahadur v Basivi Reddi.

Oldfield, J.

Receiver—Appointment of—Decree for sale on simple mortgage—Personal remedy barred—Mortgage—Power of Court to appoint receiver.

Per *Oldfield, J.* (*Sadasiva Aiyar, J.* contra).—The Court has power to appoint a receiver of the mortgaged property where a decree for sale is passed on a simple mortgage, though the personal remedy is barred by limitation.

Per curiam.—The fact that the mortgage being a simple mortgage, would not entitle the mortgagee to the possession of the property or its profits, is not in law a bar to the appointment of a receiver.

Appeal from the order of the Court of the Subordinate Judge of Cocanada, in E. A. No. 1370 of 1912 (O. S. No. 60 of 1906).

B. Somayya, for appellant.

P. Somasundaram, for respondent.

The Court delivered the following

Judgments:—*Oldfield, J.*—The order appealed against is one appointing a receiver. The lower Court's statement of the facts has not been disputed and I adopt it. Shortly, the respondent holds a compromise decree against the appellant for recovery by sale of mortgage property; that property is heavily encumbered, and, if a sale were held at once, the respondent would not be likely to realise even a tenth part of his debt. He cannot bring the property to sale, because the appellant has sued for a declaration that the compromise decree was obtained through the fraud of his guardian during his minority and has got execution stayed. Meantime, interest is running. It is clear that this delay is subjecting the respondent to the risk of irreparable loss and that on general consideration his claim to provisional relief is strong. It is not denied that, when the order staying execution was made, he suggested that it should be conditional on the appointment of a receiver, but was told to apply separately; and it is possible that the lower Court in making its order had the prospect of

* A. A. O. 191 of 1913, 1st September, 1914.

Venkata Raja-Gopala Surya Row Bahadur v. Vasivi Reddi.

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such an application in mind. But it is not contended that the former was conditional on the grant of the latter, and it therefore cannot be treated as having been so.

The appellant's argument here is, as it was in the lower Court, that, as the respondent's decree for sale on a simple mortgage would not entitle him to the possession of the property or its profits, the court cannot by means of a receivership give him what it could not give by way of substantive relief, and that this is not affected by the fact that he is unable to execute in accordance with the decree.

This argument is no doubt *prima facie* sustainable and the first attempt to reconcile the appointment of a receiver with the character of the decree must be dismissed shortly. It is that, when the sale has been held and its proceeds have been found insufficient to satisfy the respondent's debt, as they are practically certain to be, he will be entitled to ask for a personal decree and a receivership of the appellant's resources in anticipation of it. There is at least one fatal objection to this, that the respondent has not shown that the personal remedy is still available to him. For it is clearly too late for him to ask for that remedy in respect of the earlier of the two mortgages he sued on, that of 1894; and it has not been shewn that suing in 1900, he can claim it in respect of the later, dated 20th June 1900. The lower Court's order must then be supported, if at all, on some wider ground than the appellant's personal liability; and it may be said at once that none of the decisions, to which I shall refer, contains any reference to personal liability, as its basis. Such wider ground has, in my opinion, been shewn to be available in the practice, on whatever considerations it be founded, of English and Indian Courts to grant the mortgagee equitable relief by way of a receivership in cases such as the present. Thus in *In re Pope* [1], it was said that "the court of equity always acted on the principle that it would never grant a receiver, where the party applying for the receiver had a legal right to possession. An equitable mortgagee could get a receiver but a legal mortgagee could not until the passing of the Judicature Act." *Vide* also *Bodger* v. *Bodger* [2], *Hopkins* v. *Worcestor and Birmingham Canal Proprietors* [3], and *Davis* v. *Duke of Marlborough* [4]. It is

1. (1886) 17 Q.B.D. 743.
2. (1862) 11 W. R. 160.
3. (1868) L. R. 6 Eq. 437.
4. (1819) 2 Swanston 108.

Venkata Raja Gopala Surya Row Bahadur v. Basivi Reddi. Oldfield, J.

objected against the application of these English authorities that in England the mortgagee's right is either to sell or obtain possession by foreclosure and that the appointment of a receiver in them may be understood as the anticipating of the latter. But the appointment is not supported in any of them on that restricted ground; nor is the restriction recognised in any of the Indian cases, in which they are relied on.

In India the current of decisions has been clear in repondent's favor, for appellant has not shewn that any of them were based on the decree-holder's right to possession, immediate or future, and has cited, no case, similar to the present, in which a receiver has been refused. *Jai Kishen Das Ganga Das* v. *Zeenabai and Kasi Mahomed Myia Dada Myia* [1], was referred to by the lower Courts. But it is of assistance only because *In re Pope* [2], is referred to in it with approval the suit having been brought on the original side for sale or foreclosure in the alternative. *Latafut Hussain* v. *Anunt Chowdhury* [3] was, like *Jai Kishen Das* v. *Zenabai* [1] decided under the code of 1882, though it has not been shewn that any subsequent change in the law affects the argument. In the former, the appointment of a receiver was refused; but it had been applied for by the mortgagor in circumstances not resembling those before us. The facts in *Ghanashyam Misser* v. *Gobinda Mani Dasi* [4], are not given fully in the report. But it is plain that sale, not possession, was the mortgagee's remedy. It was held that there would be no obstacle to the appointment of a receiver, if one were justified by the circumstances of the case. This authority was followed by this court in *Arunachellam Chettiar* v. *Manicka Vachaka Desikar* [5], and reference to the record in the case shows that the facts resembled those before us closely, because the decree was on a simple mortgage and its execution had been stayed. The three remaining decisions to be considered are also clearly in respondent's favor and were reached after consideration of the English practice. In two of them, though the report contains no explicit statement, it is clear that the mortgage did not transfer to the mortgagee any title to the property or present or future right to possession; and it is therefore to be inferred that the mortgage was (as here) simple and the

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1. (1890) I. L. R. 14 B. 431. 2. (1886) 17 Q.B.D. 743.
3. (1896) I. L. R. 23 C. 517. 4. (1902) 7 C.W.N. 452.
5. (1909) 6 M.L.T. 238.

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remedy was by sale. For apart from the fact that the transactions in question took place in the mofussil there is no reference to any special rights in connection with them. In *Weatherall* v. *Eastern Mortgage Agency* [1], there was in connection with the mortgage a trust deed, to which the mortgagee company consented, but in which it did not join, by which the mortgagor vested the property and its possession in trustees to discharge the debt and interest on it from the profits, and in *Eastern Mortgage and Agency Co., Ltd.* v. *Rakea Khatur* [2], the mortgage sued on included provision for the appointment of two managers statedly on behalf of the mortgagors, who must therefore have retained their rights. In both these cases the Court held that default in payment of interest justified appointment of a receiver pending trial. Lastly, in *Khubsurat Koer* v. *Saroda Charan Guha* [3], appointment of a receiver was refused, because the decree was for foreclosure. But the Court said "that if it had been for sale and it had been established that the security was not sufficient to satisfy the judgment debt, a receiver would have been appointed almost as a matter of course, especially if there had been default in payment of interest."

Authority being in accordance with the decision of this Court, *Arunachellam Chettiar* v. *Manica Vachaka Desikar* [4], and negativing the appellant's objection, the conclusion must be that the appointment of a receiver was within the lower Court's powers. It was certainly justified by the circumstances. The appeal must therefore in my opinion be dismissed with costs.

Sadasiva Aiyar, J.—The judgment-debtor is the appellant. A compromise decree for sale of the mortgaged property on failure to pay the amount agreed upon between the parties was passed in July 1907. The judgment-debtor has brought a regular suit No. 4 of 1912, to have that compromise decree set aside and has obtained an injunction against the decree-holder's bringing the mortgaged property to sale in execution of that campromise decree. Thereupon the decree-holder applied for the appointment of a receiver to take charge of the properties and to receive the rents and profits; and his application has been granted by the executing Court. The present appeal is against that order appointing a receiver.

1. (1911) 13 C. L. J. 495.
2. (1912) 17 I. C. 202.
3. (1911) 14 C. L. J. 526.
4. (1909) 6 M. L. T. 238.

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Mr. B. Somayya, who argued the case before us for the judgment-debtor with remarkable ability relied upon several English, Irish, American and Indian authorities in support of his contention that unless the mortgagee was entitled to immediate possession of the corpus of the mortgaged property or at least to the immediate receipt of the rents and profits, the court has no power to appoint a receiver at the instance of a mortgagee. I do not intend to deal with these cases in detail. Most of the English cases relates to English mortgages and it is well known that the mortgagees under the English form of mortgage are in the case of the Common Law, the legal owners of the mortgaged property and are entitled whenever they wished to obtain actual possession of the corpus and of the rents and profits. They were at first not given the right to have a receiver appointed through Court, as they had the higher, though very inconvenient right as owners of taking possession, the inconvenience arising out of their obligation to keep correct accounts of the profits and to take due care of the mortgaged property. By legislation, the right to have a receiver appointed through court has been granted to them. As regards equitable mortgages by deposit of title-deeds (I do not mean equitable mortgagees in the other sense, that is, mortgagees of the equity of redemption) Courts of Equity looked upon them in all respects as if they were legal mortgagees and though courts ot equity could not themselves award actual possession of the corpus, they appointed receivers at the instance of the mortgagees to receive rents and profits for the benefit of the equitable mortgages. After the Judicature Acts (see Ashburner on Mortgagees, pp. 297 and 298) possession can be given to equitable mortgagees provided there is no legal mortgage outstanding. Similarly, in the case of second and third mortgagees, receivers were appointed subject to the right of the first legal mortgagee as the documents obtained by the 2nd and 3rd mortgagees were also in the English form which contains a clause conveying the mortgagor's right of ownership.

Then there are some cases where receivers were appointed at the instance of debenture share-holders who have usually the right to be paid the interest on their debenture shares out of the annual profits of the company.

Mr. B. Somayya argued on these authorities that it was the fact that mortgagees and debenture share-holders had an interest in or

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charge on the rents and profits that gave the power and jurisdiction to the court to appoint a receiver for their benefit. I think, however, that he put the matter too high in so stating the proposition, the circumstance to which he referred had undoubtedly the effect of making the court's receiver to grant the application for receivership, as "justice and convenience" could readily be shown to be promoted by the appointment of a receiver in such cases; but I do not think that circumstance, namely the existence in the plaintiff of a right to receive rents and profits or of a charge in his favour on the rents and profits is the indispensable pre-requisite for the exercise of the Court's power to appoint a receiver. The new Civil Procedure Code, Order 40, rule (1) (following the Judicature Act of 1873, S. 25 gives the widest power to a Court to apppoint a receiver of "any property" whenever it appears to the court to be "just and convenient" whereas the old S. 503 gave power to the Court to appoint a receiver only when it was "*necessary for the realization, etc.,*" of a property, "the subject of a suit or attachment." The learned commentators, no doubt, throw out a suggestion in Woodroffe and Ameer Ali's Civil Procedure Code, page 1196, that though the words "any property" are used in Order 40, rule (1) it must be the subject of a suit or attachment. But I do not see why such a restriction should be placed.

In *Arunachellam Chettiar* v. *Manika Vachaer Desiker* [1], it was held that (as I understand the judgment) (1) where the mortgagee decree-holder was prevented by an injunction (as in this case) from bringing the property to sale (2) where the security was insufficient for the realization of the decree-amount by its sale alone (again as in this case) and (3) where added to the above two facts, the balance of the decree after the sale of the mortgaged property, a supplemental decree against the defendant for the balance of the decree-amount by the attachment and sale of his other properties could be passed, the Court had the power to appoint a receiver for the rents and profits of the mortgaged property in order that the accumulated rents and profits might be available to the decree-holder for the attachment if and when he obtains his supplemental decree. I am therefore clear that Mr. Somayya's first contention is stated too widely and cannot be accepted.

1 (1909) 6 M. L. T. p. 238.

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His next contention was that under the terms of the decree in the present case, the decree-holder is not entitled, after the sale of the corpus of the mortgaged property, to get a supplemental decree for recovery of the balance of the decree amount by proceeding in execution against other properties of the judgment-debtor and that therefore the appointment of a receiver for the purpose of preserving the rents and profits in order that they may be available to the decree-holder for attachment in execution of a further supplemental decree is futile in this case and ought not to have been granted.

Having considered the terms of the compromise decree carefully and having regard to the fact that the remedy against the other properties appears *prima facie* barred on the date of the suit so far as the amount due on one of the two mortgage deeds on which the suit was brought is concerned and that it is nor clear that such a remedy is not barred even as regards the sum due on the second document and that it is also an arguable point whether a compromise decree for the sale of the mortgaged properties can be followed by a supplemental personal decree for the decree amount, I have come to the conclusion that this was not a fit case for the appointment of a receiver of the rents and profits. This aspect of the case seems not to have been brought to the notice of the lower Court. The learned Sub-Judge assumes that the respondent is entitled to "proceed" against other properties of the judgment-debtor for "realising the entire balance that may be due to him (the decree-holder) after the sale of the above mortgaged villages" and that hence, "it is but just to take steps to preserve the rents of the villages for the benefit of the petitioner from loss" but, as I said above, the assumption is, *prima facie*, a mistaken one. Of course, if the corpus itself is likely to deteriorate by acts of waste threatened by the judgment-debtor a receiver could be appointed but there is no such allegation in this case.

As to the hardship on the decree-holder who is prevented by injunction from bringing the mortgaged properties to sale and further being unable to get a receiver appointed through its being doubtful whether he is entitled to a supplemental decree after the sale of the mortgaged property, I have no doubt that when this hardship is pointed out, any application he might make in the suit for the dissolution of the injunction granted at the instance

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of the plaintiff in that suit (the judgment-debtor herein) will be favourably considered by the court which granted the injunction.

In the result, I would set aside, the lower Court's order. Under the circumstances, I would direct the parties to bear their respective costs in both courts.

THE COURT :—

In the result the appeal is dismissed with costs.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Mr. Justice Ayling and Mr. Justice Tyabji.

Narayanan Chettiar ... *Appellant**

v.

Rathnasabapathy Aiyar and others ... *Respondents.*

Narayana Chettiar v. Rathnasabapathi Aiyar.

Limitation—Art. 120—Decree against father—Suit for declaration that decree binding against sons—Amendment of plaint—Addition of prayer for direction for payment against sons more than 6 years after date of decree—Effect of—Practice —Amendment.

Where the plaint as originally presented asked merely for a declaration that a decree obtained by the plaintiff against the defendants' father was binding on them but subsequently a prayer was allowed to be added by way of amendment of the plaint seeking for a direction to the defendants to pay the amount of the decree.

Held, that the suit was not barred though at the date of the amendment more than 6 years had elapsed from the date of the decree.

Venkata Perumal v. Velagudha Reddi [1] and *Welden* v. *Neal* [2] considered.

Sevugan Chetty v. *Krishna Aiyangar* [3] followed.

Second appeal against the decree of the District Court of North Arcot in A. S. No. 51 of 1909 preferred against the decree of the Court of the District Munsiff of Vellore in O. S. No. 251 of 1907.

On 21-8-1901, plaintiff obtained a decree on a promissory note againt defendants' father in O. S. No. 295 of 1901. During the pendency of the execution proceedings defendants' father died. Plaintiff sought to execute the decree against th defendants but was unable to realise the amount from them. (7-8-1907 plaintiff instituted the suit which is the subject the present second appeal. The suit as originally framed was a declaration that the decree in O. S. No. 295 of 1901 was b ing on the defendants and that they were liable to pay the de debt to the extent of the ancestral property in their possessio The defendants contended *inter alia* that the plaintiff should have

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* S. A. No 218 of 1912. 1st February, 1915.

1. (1914) 27 M. L. J. 27. 2. (1887) 19 Q. B. D. 394.

3. (1911) I. L. R. 36 M. 378.

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asked for further relief in the suit, *viz.*, the recovery of the decree amount from the defendants. On 24-2-1908 the plaintiff applied for leave to amend the plaint and the District Munsiff passed an order allowing the amendment. The plaint was accordingly amended and a prayer for the recovery of the decree amount from the defendants was inserted on 15-7-1908.

The District Judge on appeal, held that, though the suit was instituted within 6 years from the decree in O.S. No. 295 of 1901, the amendment asked for a new and distinct relief, *viz.*, the recovery of the decree amount from the family property of the defendants and that to allow the amendment after the period of limitation would be to deprive the defendants of a defence open to them at law, consequently he refused to allow the amendment and dismissed the plaintiff's suit. Against this, the plaintiff preferred a second appeal to the High Court.

L. A. Govindaraghava Aiyar for Appellant.

C. S. Venkatachariar for Respondents.

The Court delivered the following

Judgment:—The plaint as originally presented asked merely for a declaration that the decree obtained by the plaintiff in O. S. No. 295 of 1901 against the father of the defendants was binding on the defendants. Subsequently, a prayer was allowed to be added by way of amendment of the plaint. The prayer so added asked for a direction that the defendants do pay the amount of the said decree.

The lower Courts have held that the suit was barred because at the date of the amendment the decree was more than 6 years old and a suit such as the present suit became after the amendment, would have been barred, had it been instituted at the date of the amendment. *Periasami Mudaliar* v. *Seetharama Chettiar* [1].

In our opinion the Lower Courts have misunderstood the law applicable to the facts before them. The plaintiff did not seek to plead any new facts when he applied for leave to amend the plaint. All he desired to do was to be allowed to ask for a fresh relief on the facts already pleaded The relief that has to be granted on the facts alleged and proved has to be fixed by the Court and we agree with the decision in *Sevugan Chetty* v. *Krishna Aiyangar* [2] the fresh portion of the Judgment in that case is

1. 27 M. 243. 2. (1911) I. L. R. 36 M. 378.

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applicable to the facts of the present case without any material alteration.

Our attention has been drawn to the remark made in *Kumara Venkata Perumal* v. *Velyauda Reddi* [1], by the present Chief Justice (then Wallis, J.,) with reference to the decision in *Sevugan Chetty* v. *Krishna Aiyangar* [2]. That remark is based on *Weldon* v. *Neal* [3]. As the lower Appellate Court has also referred to that decision, we may point out that Lord Esher, M. R., qualifies his opinion by saying that as a general rule, it would be in his opinion improper and unjust to allow an amendment setting up a new cause of action, a writ in respect of which cause of action would be barred at the date of the amendment. He goes on to state that there were no peculiar circumstances of any sort to constitute the case he was deciding an exception to the rule he started. The Lords Justices agree with the Master of the Rolls. There is no reason why what is stated as a general rule (evidently admitting of exceptions) in cases where a new cause of action is set up should be given effect to as a rigid principle to be invariably applied; and why it should moreover be applied to a case where no new cause of action is being set up but a relief that was omitted in the first instance is added, *Mohummud Tahool Alikhan* v. *Mussumat Thakooranee Rutta Koer* [4]. Their Lordships of the Privy Council far from referring to the bar of limitation as an absolute answer to any application for amendment, refer to the fact that the plea of limitation would be set up as a defence to a new suit, and make that their reason for permitting the amendment.

We will therefore reverse the finding of the Lower Appellate Court on the 4th issue and remand the case for being disposed of in accordance with law. The respondent will be entitled also to have his memorandum of objections heard and determined if he so desires. Costs will abide the result.

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1. (1914) 27 M. L. J. 27.
2. (1911) I. L. R. 36 M. 378.
3. (1887) 19 Q. B. D. 394 at 396.
4. (1867) 11 M. I. A. 468 at p. 485.

IN THE HIGH COURT OF JUDICATURE OF MADRAS.

Present:—Mr. Justice Spencer and Mr. Justice Seshagiri Iyer.

Parvathi Ammal ... *Appellant in S.A. 1127 of 1914 Respondent in S. A. No. 1147 of 1914 (Defendant.)*

v.

Govindaswami Pillai ... *Respondent in S. A. No. 1127 of 1914. Appellant in S. A. No. 1147 of 1914 (Plaintiff.)*

Parvathi Ammal v Govindaswami Pillai.

Right of suit—Execution sale—Set aside for irregularity—Decree-holder responsible—Suit for refund of poundage and for interest—Civil Procedure Code—O. 21 R. 93—No bar to.

Where an execution sale is set aside on the ground of material irregularity for which the decree-holder is responsible, the purchaser has a remedy by way of suit to recover from the decree-holder the amount deducted from the purchase money for poundage as well as interest on the purchase money and this right is not taken away by O. 21 R. 93.

Right to recover purchase money when sale set aside for want of saleable interest and for irregularity distinguished.

Second Appeals against the decrees of the Court of Temporary Subordinate Judge of Tanjore, in A. S. Nos. 690 and 718 of 1912 respectively both preferred against the decree of the Court of the District Munsif of Tanjore in O. S. No. 271 of 1911.

Suit to recover from defendant Rs. 1,299-8-0 under the following circumstances. The defendant obtained a decree against one Ramaswami and others in O. S. No. 29 of 1907, on the file of the Sub-Court of Tanjore. In execution of that decree, the properties held liable thereunder were brought to sale and purchased by the plaintiff for Rs. 7,130. The plaintiff deposited the amount in Court. Subsequently, the judgment-debtor applied to set aside the sale under O. 21 r. 90 of the Civil Procedure Code. It was found that the decre-holder (defendant) was esponsible for the material irregularity in publishing or conduct-g the sale, in as much as he had grossly undervalued the operties sought to be sold. The sale was consequently set de under O. 21 r. 92 of the Civil Procedure Code, in spite of opposition of the auction-purchaser (plaintiff). The plaintiff s able to get back only Rs. 6,992 out of the purchase-money, remaining Rs. 138 being taken by the court for the expenses the sale. The plaintiff thereupon sued to recover from the endant the sum of Rs. 1,299-8-0, being the amount of

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poundage taken by the court, interest on Rs. 7,130 from date of deposit in court to the date of withdrawal, and the costs of opposing the proceedings under O. 21 rr. 90 and 92, Civil Procedure Code. The Lower Appellate Court disallowed the plaintiff's claim for interest and costs but allowed his claim for poundage. The plaintiff appealed against the decree in so far as it disallowed his claim for interest, and the defendant appealed against it in so far as it allowed the claim for poundage. Plaintiff's appeal was S. A. No. 1147 of 1914, and the defendant's appeal was S. A. 1127 of 1914.

K. S. Ganapathi Aiyer for the appellants (in S. A. 1127 of 1914) :—

I submit that a separate suit of this kind is not maintainable. The claim for poundage and interest ought to have been made when the sale was set aside under O. 21. r. 92, Civil Procedure Code. O. 21 r. 93 gives a right to the purchaser to apply for a refund of the purchase-money with interest. In the case of a court-sale there is no warranty of title. The purchaser takes the risk. *Dorab Ali v. Khajee Moheedoodeen* [1]. An exception to this rule was introduced in cases where the judgment-debtor had absolutely no saleable interest in the property.

See S. 258 of the Civil Procedure Code of 1859 and S. 315 of the Code of 1882. Under S. 315 of the Civil Procedure Code of 1882 it was held that the right to recover the purchase-money might be exercised either by suit or by petition in execution proceedings. The language of O. 21 r. 93 differs from S. 315 of the Code of 1882. The right is no longer a substantive right entitling the auction-purchaser to recover his money, but a right to get an order in execution proceedings for repayment, if the sale is set aside under O. 21 r. 91. There is no difference between a case where the sale is set aside under O. 21 r. 90 an where it is set aside under O. 21 r. 91. In both cases the rig to sue for the purchase-money is taken away by O. 21 r. 93. *Mol deen Ibrahim v. Mahomed Mura Levai* [2], per *Napier J.* The de sions under the old S. 315 recognising a right of suit are no lon law. The claim for poundage and interest is unsustaina Poundage is a fee payable to the court. The decree-holder has had the benefit of the money. Rule 157 (2) of the Civil Rules Practice does not provide for the refund of poundage in cases wh

1. (1878) I. L. R. 3 C. 806. 2. (1912) 23 M. L. J. 487.

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a sale is set aside under O. 21 r. 90. Interest is allowable under O. 21. r. 93 only when the money has been paid to the decree-holder. Here it was all along in the custody of the court. Interest was therefore rightly disallowed.

G. S. Ramachandra Aiyer for the Respondent. I submit that the suit is maintainable. This is not a case where the sale has been set aside for want of any interest in the judgment-debtor. It is only in such a case that S. 258 of the Civil Procedure Code of 1859 and S. 315 of the Code of 1882 applied and gave a right of suit, which would otherwise be non-existent. Where the sale went off, on account of the default of the decree-holder, the auction-purchaser could sue for the purchase money, irrespective of the enabling provisions of the Code of 1859 and 1882. *Soudamani Chowdranee* v. *Krishen Kishore Poddar* [1]. The observations of Napier, J. in *Mohideen Imbrahim* v. *Mahomed Levai* [2] are not sound. The change in O. 21 r. 93 is verbal and is not meant to deprive the right of suit which existed under S. 315 of the Code of 1882. Even if the decision of Napier, J. is correct, it does not touch the present question. Here there has been no complete sale at all. The decree-holder was responsible for the irregularity. I want to be discharged from the bargain and to be restored to the *Status quo.* The present action is different from one for recovery of the purchase-money for want of title in the judgment-debtor. This is a suit to recover the costs and expenses of an abortive sale, from the decree-holder who is the person at fault. Such a suit is maintainable. *Bullen* v. *Ansely* [3], *Powell* v. *Powell* [4], *Perkins* v. *Ede* [5], *Holliwell* v. *Seacombe* [6], *Else* v. *Else* [7] and *Hanuman Kamat* v. *Hanuman Mandur* [8]. Poundage is the fee payable to the court for the services of its officer to the decree-holder and it is deducted from the purchase-money. In England it is payable to the Sheriff, who has to refund it, if he sells without jurisdiction or in contravention of law. See Halsbury, Vol. XIV, p. 34, American Cyclopaedia, Vol. 24, pp. 70, and 2. The mere omission of poundage in R. 157 (2) of the Civil Rules of Practice, does not take away my right to its refund. Interest also must be allowed for the time the purchase money was out of my hands.

1. (1869) 12 W. R. (F. B.) 8.
2. (1912) 23 M. L. J. 487.
3. (1807) 6 Esp. 111.
4. (1875) L. R. 19 Eq. 425.
5. (1852) 16 Beav. 268.
6. (1906) 1 Ch. 426.
7. (1872) L. R. 13 Eq. 196.
8. (1891) 19 Cal. 123.

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The Court delivered the following

Judgment : The facts of the case are not in dispute, the defendant obtained a decree against certain persons. Immoveable properties were sold under that decree and the plaintiff became the purchaser. At the instance of the judgment-debtors the sale was set aside on the ground of irregularities in the conduct of the sale. Plaintiff, the purchaser, sued to recover the amount of the poundage fee deducted from the purchase-money paid by him, and also interest. The claim for Vakil's fees, etc., has not been pressed before us. The District Munsif held that plaintiff was entitled to interest at 6 per cent. and that a separate suit does not lie to recover poundage. Both the parties appealed. The Subordinate Judge held that the claim for poundage was sustainable, but that interest should not have been decreed. Second Appeal No. 1127 of 1914 is by the defendant against the decree for poundage. Second Appeal No. 1147 of 1914 is by the plaintiff for the interest disallowed.

Before dealing with the question of law argued before us, we may state that we see no reason to differ from the conclusion of the courts below that defendant is responsible for the irregularities in the conduct of the execution sale. In the order passed on the application of the judgment-debtor, the Subordinate Judge held "that the decree-holder was responsible for the material irregularity in publishing or conducting the sale." (See paragraph 9 of the District Munsif's Judgment). The District Munsif in the present suit came to the same conclusion; apparently the liability of the defendant was not disputed in appeal. It is true the court in ordering the sale of the property should have directed the amin to sell the property in different lots, but that would not absolve the defendant from his liability. The responsibility of the officer levying execution in the mofussil is not that of the sheriff in England. It is the duty of the decree-holder to put the court in possession of the necessary information and to attend to the various requirements of the law in publishing and conducing the sale. The Court cannot be proceeded against for irregulari in execution, if it acted to the best of its information and witho malice. The party who puts the court in motion is liable to th purchaser who has been aggrieved. Even in Sheriff's sales, the pur chaser is entitled to proceed against the decree-holder. 'In *Dora Ally Khan* v. *Khajee Moheedoodeen* 1. In which the Judicial Co

1. (1878) L. R. 5 I A. 116; s c. 3 C. 806.

mittee had to pronounce upon the liability of the Sheriff who executed a decree of the original side of the Calcutta High Court, it was pointed out that the Sheriff may render himself liable if he seized the property situated beyond his territorial jurisdiction or if he exceeded the powers expressly conferred on him by the statute. Their Lordships have also laid down that where the Sheriff acts under the advice and guidance of the execution creditor, the latter will be responsible to the purchaser, the present is an *a fortiori* case.

The main question argued related to the maintainability of the suit. Mr. Ganapathi Aiyar contended that the plaintiff should have sought redress in execution and that a separate suit does not lie. Section 315 of Act XIV of 1882 provided for two classes of cases: (1) where the sale has been set aside as provided for in the Code and (2) where it was found that the judgment-debtor had no saleable interest in the property sold.

The present code contains no provision regarding the right of the purchaser to obtain a refund of his purchase-money without applying to set aside the sale when it is subsequently found that the judgment-debtor had no saleable interest in the property. It may be as suggested by Mr. Ramachandra Aiyar for the respondent that unless the purchaser seek the aid of the Court to set aside the sale, he has no remedy against the decree-holder. It was laid down by the Judicial Committee in *Dorab Ally Khan* v. *Khajee Moheedoodeen* [1], that there was no warranty of title in Court sales. See also *Sundaragopalan* v. *Venkata Varada Aiyangar* [2]. The right of action to obtain a refund consequent on the want of saleable interest in the judgment-debtor is not a right inhering in a purchaser, but is only the creature of a statute and the right thus conferred can only be exercised within the limitations prescribed. Consequently, without getting the sale set aside through court, the purchaser has no right of action. The general principle of *caveat emptor* would affect the purchaser unless he chooses to adopt e remedy given him by the statute. But the right to recover om a party whose fraud or carelessness has led to the invalidity the sale stands on a different footing. In such cases by neglectng the duty cast on him, he renders himself liable to compensate he injured party for the loss the latter has sustained. This right is not created for the first time by the statute. The Code

1. (1878) L.R. 5 I.A. 116. 2. (1893) I.L.R. 17 M. 228; s.c. 3 M.L.J. 293.

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only recognised what has existed all along. As stated by Sir James Bacon (Vice Chancellor) in *Powell* v. *Powell* [1], the purchaser is entitled under these circumstances to be discharged from his contract by reason of the invalidity of the proceedings which led up to the sale and is entitled to be placed in *statu quo ante.* The same proposition is stated in 24 Cyclopedia of Law and Procedure 70 thus:—" It is generally held that when the proceedings are invalid, so that the purchaser loses the land, title to which he would have had but for the defects in the proceedings, he is entitled to recover back the purchase money paid by him, and to be re-imbursed for money expended by him for taxes and on repairs and improvements that have increased the value of the land." The Decision in *Mohideen Ibrahim* v. *Mahomed Meera Levvai* [2], on which the appellant relied strongly does not touch the present question. Mr. Justice Spencer held in that case that where the purchaser was deprived of his possession by reason of a decision in a subsequent suit, he is not entitled to sue for the return of the purchase-money. The omission from the Code of 1908 of the clause relating to the want of "Saleable interest" in the judgment-debtor is relied on strongly by the learned Judge. In the present case the sale has not become abortive owing to be absence of saleable interest in the judgment-debtor. Mr. Ganapathy Aiyar contended that the words of S. 315 of Act XIV "that the purchaser shall be entitled to receive back his purchase-money" may confer a right of suit as held in numerous cases, but that the words "shall be entitled to an order for repayment" in rule 93 indicate a deliberate policy to restrict the remedy to execution in all cases of sales being set aside. We are unable to see the distinction. There are no words in the present code as in the code of 1882, enabling the purchaser to realise his money by way of execution. Further he is no party to the suit or the decree. Unless, therefore, his right of action is taken away by express words, he is entitled to pursue his ordinary remedy by filing a suit.

Another contention of the appellant was that as pounda[ge] is taken by the court, the decree-holder is not bound to pay it [to] the purchaser. This argument proceeds on a misconception [of] the nature of the poundage fees. As was pointed out b[y] Mr. Ramachandra Aiyar in his able argument, what the purcha[ser]

1. (1872) 19 Equity Cases 422. 2. (1912) 23 M. L. J. 487.

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ser claims is really a portion of the purchase money. It is from the payment made by him the court makes a deduction for poundage and pays the balance to the decree-holder. Poundage is the fee which is levied in England by the sheriff as remuneration for his service. In this country, as the officers of the court conducting the sales are paid a fixed salary a certain percentage of the purchase-money is taken for purchasing stamps. In effect the fee is a charge paid by the decree-holder for the services he obtains from the court. In England as well as in this country, this fee is taken out of the sale proceeds. See paragraph 71 in 14 Halsbury's Laws of England and Rule 154 of the Civil Rules of Practice. There is, therefore, no warrant for the suggestion that in claiming the money retained as poundage fees, the purchaser does not ask for the return of the purchase money. Nor do we see any reason to assent to the argument that the claim for the recovery of such fees should be disposed of in execution. The omission of the word "poundage" in Rule 157 clause (2) was much relied on; this omission cannot affect the substantive right of suit which the purchaser has. It was held in *Rawstorne* v. *Wilkinson*[1], that the Sheriff has a right of action to recover poundage fees where the sale proves abortive. *See* also *Tyson* v. *Paske*[2]. The auction purchaser whose money has been paid by way of poundage to the Sheriff will stand in his shoes to recover it against the execution creditor. The fact that it is retained by the court can make no difference in principle. We have, therefore, come to the conclusion that the Subordinate Judge was right in holding that the suit is not obnoxious to the execution provisions of the Code of Civil Procedure. We dismiss second Appeal No. 1127 of 1914 with costs.

We are, however, unable to agree with the Lower Appellate Court that the purchaser has lost his right to interest by any laches on his part. He is under no duty to see that the property is put up for sale in separate lots. He is not affected by any anterior mismanagement in the conduct of the sale. He has to take the property as advertised and sold. As he paid the money required by law, there is no reason for depriving him of the interest on his money. *See* *Raghubai Dayal* v. *The Bank of Upper India Ltd*[3]. The rate of interest awarded by the Munsif

1. (1815) 4 M. & S. 256. 2. 2 Ld. Raym. 1212 s.c; 92 E. R. 300; 3. (1882) I. L. R. 5 A. 364.

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is correct. We must reverse the decree in second Appeal No. 1174 of 1914 with costs in this and in the Lower Appellate Court and give a decree for Rs. 306 with interest at 6 per cent from the date that the plaintiff deposited the money into court.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Mr. Justice Sadasiva Aiyar and Mr. Justice Napier.

Messrs. Augustus Brothers ... *Plaintiff**

v.

M. A. Fernandez ... *Defendant.*

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Civil Procedure O. 2 R. 2—Village Munsiff's Court—Suit on portion of claim in—Subsequent suit for balance in Civil Court—Not barred—Purchases on different dates—Cause of action distinct.

Order 2 R. 2 does not bar a suit brought for the balance of a claim arising out of a cause of action after a suit has been brought for one portion of the claim in the Village Munsiff's court.

Quaere : Where a customer makes distinct purchases on distinct dates, if the merchant has not got a distinct cause of action in respect of each purchase or set of purchases.

Case stated under Rule 1 Order 46 of Schedule I of Act V of 1908 by the Subordinate Judge of Cochin in Small Cause suit No. 97 of 1913.

The parties were not represented.

The Court delivered the following

Sadasiva Aiyar, J.

Judgments :—*Sadsiva Aiyar, J.*—The facts which have led to this reference by the Subordinate Judge of Cochin in a small cause suit in his Court might be shortly stated thus:—The defendant made purchases from the plaintiff's shop for small sums from time to time till 26th May 1912, made part-payments and had to pay Rs. 88-7-0 as balance on such purchases. The suit was brought in September 1913 for the recovery of this Rs. 88-7-0 and interest. The Plaintiff had, at the end of 1912, brought a suit in the Village Munsif's Court of Cochin for the recovery of Rs. 2-4-0 being the price of one bottle of whisky purchased by the defendant in April 1912, this item of Rs. 2-4-0 being one of the several items of account in respect of the purchases made by the defendant up to the 26th May 1912.

The Lower Court has made this reference assuming that, if the first suit had been brought in an ordinary Civil Court instead

* R. C. No. 1 of 1914. 31st August 1915.

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of in the Court of the Village Munsif, O. 2 r. 2 corresponding to old section 43 of the Civil Procedure Code would be a bar to the present suit. O. 2 R. 2 says (omitting portions unnecessary for this case). "Every suit shall include the whole claim which the plaintiff is entitled to make in respect of the cause of action. Where the plaintiff omits to sue in respect of any portion of his claim, he shall not afterwards sue in respect of the portion so omitted."

I am not at all sure that where a customer makes distinct purchases on distinct dates, the merchant has not got a distinct cause of action in respect of each purchase or set of purchases. In *Beni Ram* v. *Ramchander* [1] it was held doubting the decision in *Preonath Mukerji v. Bishnath Prasad* [2] that when a debtor gave a hundi for Rs. 500 out of a debt of Rs. 4,000 and odd and the creditor first brought a suit on the hundi, he was not precluded from maintaining a second suit for the balance due on accounts by reason of O. 2 r. 2. In the case in *Preonath Mukerji* v. *Bishnath Prasad* [2], (the soundness of the decision in which was doubted in *Beni Ram* v. *Ramchunder* [1]), the court held that where a doctor got a promissory note and recovered Rs. 700 he was barred by S. 43 (O. 2 r. 2) from bringing a suit for the Rs. 600/- due for the attendance during the remaining 6 days. In *Mandal and Co.* v. *Fazul Ellahie* [3]. Jenkins C. J. and Woodroffe, J. held that though the contract between the parties was contained in one and the same writing if that writing expressly said that it related to two separate contracts (one relating to the delivery of cases of candles to be shipped in July 1908 and the other to the delivery of cases of candles to be shipped in August 1908) two separate suits—I am aware that a merchant does not usually bring numerous separate suits—can be maintained against the same customer, each suit for the amount due on each purchase transaction. But that is because he is entitled under O. 2 R. 3 Civil Procedure Code to unite in the same suit several causes of action against the same defendant unless prohibited by R. 4 and 5 of O. 2. O. 2 R. 2 prohibits only the splitting of claims arising out of *the same cause of action* and if the cause of action in respect of the purchase for Rs. 2-4-0 was different from the other causes of action in respect of other purchases and if there was no

1. (1914) I.L.R. 36 All. 560. 2. (1907) I.L.R. 29 All 256=4 A.L.J. R. 85.
3. (1914) 41 Cal. 825.

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agreement or settlement of accounts between the parties which consolidated all these separate causes of action, into one cause of action, I think that O. 2 R. 2 has no application and this reference is therefore incompetent.

Assuming, however, that the claim made in the Village Munsif's Court was on the same cause of action as that under which the present suit is brought, the question is whether O. 2 R. 2 is applicable when the first suit had been brought in the Village Munsif's Court. In *Mir Khan* v. *Kadarsa* 1, it was held that the Civil Procedure Code, has no application to the Courts of village Munsifs at all as Section 6 of the old Civil Procedure Code provided that nothing in the Civil Procedure Code, affected the jurisdiction or procedure of Village Munsif's and that hence the concurrent jurisdiction of the ordinary Civil Courts was not taken away by the provision in S. 15 of the Civil Procedure Code that "every suit shall be instituted in the Court of the lowest grade competent to try it." Though, in the present case, the provision of the Civil Procedure Code to be considered is not S. 15, but O. 2 R. 2, the same reasoning applies. But the learned Subordinate Judge who has made this reference entertains a doubt as to whether the decision in *Mir Khan* v. *Kadarsa* 1, even as regards the applicability of S. 15 of the Civil Procedure Code has not become inapplicable where the decision has to be under the new Code owing to the change in the language of S. 6. S. 6 of the old Code of 1882 enacted (among other things) as follows :—"Nothing in this Code affects the Jurisdiction or procedure...(c) of Village Munsifs or Village punchayats under the provisions of the Madras Code or (d) shall operate to give any court jurisdiction over suits of which the amount or value of the subject matter exceeds the pecuniary limit of its ordinary jurisdiction." S. 6 of the Code of 1908 says :—"Save in so far as is otherwise expressly provided, nothing herein contained shall operate to give any court jurisdiction over suits the amount or value of the subject matter of which exceeds the pecuniary limits (if any) of its ordinary jurisdiction. The learned Subordinate Judge who has made this reference thinks that the omission in the present code of the words "affects jurisdiction or procedure of Village Munsifs, etc.," on which words the learned Judges who decided *Mir Khan* v. *Kadarsa* 1, relied

1. (1889) I. L. R. 13 M. 145.

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might make some difference, though he notices that S. 4 of the new Code of 1908 is more widely worded than S. 4 of the old Code. While S. 4 of the old Code saved certain specific Acts affecting the Central Provinces, Burma, Punjab and Oudh and the laws passed under the Indian Councils Act of 1861 relating to suits between landlords and tenants and suits relating to partition of immovable property, S. 4 of the new Code of 1908 very generally says that nothing in this Code shall be deemed to limit or otherwise affect any special or local law now in force or any *special* form of procedure prescribed by or under any other law. "It was because the savings under S. 4 had been extended in the new Code, S. 6 of the new Code confined itself to the provision (*d*) of the old Code S. 6 namely, that ordinary pecuniary jurisdiction should not be exceeded. The learned Subordinate Judge says that S. 4 (1) of the new Code as regards this saving clause is somewhat differently worded from the saving clause of S. 6 of the old Code and hence he is in doubt as to whether the ruling in *Mir Khan* v. *Kadarsa* [1], is applicable when interpreting S. 4 (1) of the new Code in the same manner as when interpreting S. 6 of the old Code. I do not find any material change in the wording and if there is any difference, the saving under S. 4 (1) of the new Code is larger in scope than that under S. 6 of the old Code and hence the *ratio decidendi* in *Mir Khan* v. *Kadarsa* [1], is *a fortiori* applicable to Section 4 (1) of the new Code.

Ameer Ali and Woodroffe are also of opinion (See commentary under S. 6) that "it was in view of the extended scope of S. 4 of the present Code, the reproduction of Ss. 6 and 7 of the last code (except as to the final paragraph of which is the present S. 6) has been considered necessary.

It is to be observed that in making this reference the Subordinate Judge has not clearly drawn up the point or points on which doubt is entertained by him (see O. 46 r. 1).

However, taking it that the reference is whether O. 2 r. 2 applies when a suit is brought for the balance of a claim arising out of the same cause of action after a suit had been brought for one portion of the claim in the Village Munsif's Court, I would answer the reference in the negative.

Napier, J.

Napier, J. I agree that the suit is not barred by O. 2 r. 2 and think that the question is clear beyond doubt. S. 4

1. (1889) I. L. R. 13 M. 145.

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Napier, J.

of the Code of 1908 is very wide in terms: therefore the provisions of the Code are inapplicable to Village Munsifs' Courts. There are no provisions in the Code for these Courts corresponding to Ss. 7 and 8 which make certain sections applicable to Provincial Small Cause Courts and Presidency Small Cause Courts. Chapter 4 to chapter 6 of the Madras Village Courts Act I of 1889 provides complete procedure for such Courts covering the same ground as the Civil Procedure Code does for its Courts. S. 18 enacts the very rule which the Subordinate Judge seeks for in the Civil Procedure Code. There are numberless sections of the Civil Procedure Code which are manifestly inapplicable to village Courts. The reference therefore must be answered in the negative.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Sir John Wallis, Chief Justice and Mr. Justice Srinivasa Aiyangar.

Gopisetti Narayanasami Naidu Garu, receiver of Nidadavole and Medur estates, ... *Appellant (Plaintiff).*

v.

Nalam Subrahmanyam ... *Respondent (Defendant).*

Narayanasami Naidu Garu v. Subrahmanyam.

Estates Land Act S. 3 Cl. (d)—"Whole Inam Village"—"Minor inams"—distinguished—Existence of latter in Village immaterial—"Sarva Inam of the temple"—Village described as—Meaning of—Jeroyati"—"Mamool Wet"—Inconsistent with being old waste.

The object of the definition in Sub-S. 2 Cl d. of S. 3 is to exclude from the definition of "Estate" "minor inams" *i.e.* grants of particular extents of land in a particular village as contrasted with "whole Inam Villages" or grants of whole villages by their boundaries. A whole village inam does not become the less so because there are some minor inams in the village.

Where a village is described as Sarva or rent free agraharam of a temple, the obvious inference is that the whole village has been granted to the temple.

The description as "Jeroyati and mamool wet" is inconsistent with the land being old waste.

Appeal against the decree of the Court of the Temporary Subordinate Judge of Ellore in O. S. No. 33 of 1913.

P. Nagabhushanam for the Appellant.

P. Narayanamurti for the Respondent.

The Court delivered the following

Judgment:—Plaintiff, the Receiver of the Nidadavole Estate sues to recover possession of certain lands let to the defendant in

A. S 75 of 1914. 28th July 1915.

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Fasli 1320 together with mesne profits. His case is that the letting was for one year and that the defendant is holding over after the expiry of the term. The defendant pleads that he has acquired the occupancy right to these lands under S. 6 of the Estates Land Act. The lower Court has dismissed the suit, and the plaintiff appeals.

The principal question which arises for determination in the appeal is whether Venkatapuram Agraharam in which the suit lands are situate is an estate within the meaning of S 3 Sub-S. 2 Cl. d, of the Estates Land Act. Venkatapuram Agraharam is an Inam Village belonging to Bala Venkateswara Swami and the grant seems to have been made by a former Zamindar of Nuzvid. The plaintiff sues as trustee of the temple. The Venkatapuram Agraharam is described in the various documents filed in the case as the Sarva or rent free, Agraharam of Sir Bala Venkateswaraswami; and this description occurs from the earlist times. (See Ex. H, the Jamabandi Account for Fasli 1268). This would obviously mean that the whole village of Venkatapuram, belonged to the temple as inam. However, there are certain minor inams in this village which appear to be of 3 classes. One class of inams being Archaka Service Inams, the other class being Village Service Inams and the third Dharmadaya Inams. It does not appear whether the grant to the temple of the village was made first or whether the minor inams were granted first.

The appellant contends that inasmuch as there are these minor Inams in the same village it could not be said that the Venkatapuram Agraharam is a village of which the land revenue has been granted as inam within the meaning of S. 3 Cl. 2 (d) of the Act. His contention being that inasmuch as the land revenue or some of the lands in the village has been granted as Inam to third parties, it cannot be said that the temple is the grantee of the revenue of that village. We are unable to agree in this contention. The definition in Sub-S. 2 Cl. (d) was obviously intended to exclude from the definition of "Estate" what are known as 'minor inams', namely, particular extents of land in a particular village as contrasted with the grant of the whole village by its boundaries. The latter are known as 'whole Inam villages'. The existence of 'minor inams' in 'whole inam villages' is very common and if these inam villages do not come within the definition of 'Estate'

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almost all the Agraharam, Shrotriem and Mokhasa villages will be excluded. This certainly cannot have been the intention of the legislature. These minor inams are generally granted for services to be rendered to the village or to the owner and that seems to be the nature of the minor inams in this case. In all the documents the temple is described as the owner of the whole village, and in these circumstances the burden is upon the plaintiff to show that the grant was only of the revenue of a portion of the land in the village, and he has not put in evidence the Inam Register which would have supported his case if true. We disallow this contention.

It is next contended that it is not shown that the Inamdar, that is the Temple, was not the owner of the Kudivaram at the time of the grant which again would take the case out of the definition of an estate. The evidence which is discussed in paragraph 15 to 17 of the lower Court's judgment shows clearly that the Inamdar, namely the Temple was not the owner of the Kudivaram at the time of the grant. We therefore hold that the Venkatapuram Agraharam of which Sri Bala Venkateswaraswami is the Inamdar or the Agraharamdar is an estate within the meaning of cl. (d) of Sub-Sec. 2 of S. 3 of the Estates Land Act.

Mr. Nagabhushanam for the appellant also argued that the suit lands are not 'ryoti lands', but are 'old waste'. In the Muchelika Exhibit B executed by the defendant these lands are described as 'Jeroyati lands', and in Ex. IX, a previous lease of the same lands, they are described as 'Mamool wet'. We hold therefore that these lands are not proved to be old waste but are 'ryoti lands.'

The appellant finally contended that the Receiver is not a landholder within the meaning of S. 6 of the Act. It is admitted that the definition of 'landholder' in S. 3 included the plaintiff, but it is said that unless the landholder is also a beneficial owner of the Estate, he is not a landholder within the meaning of S. 6. We do not see any reason to put any such restricted construction on the word 'landholder' in that section. A Receiver must have the same powers of management as an owner, and letting a tenant into possession of cultivable lands in the estate would ordinarily be included in the power of management. We agree in the conclusions of the lower Court and dismiss the appeal with costs.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

[FULL BENCH].

Present:—Sir John Wallis, Kt. Chief Justice, Mr. Justice Sadasiva Aiyar, and Mr. Justice Srinivasa Aiyangar.

Machikandi Parkum Maramittah Tharuvil Mootha Chettiam Veettil Chakkara Kannan. *Appellant* * (*Plaintiff*).

v.

Varayalankandi Kunhi Pokker. and others. *Respondents.* (*Defendants*).

Chakkara Kannan v. Kunhi Pokker.

Malabar Law.—Putravakasom gift—Gift to wife and children—Incidents of tarwad property attached—Management of senior male—Maintenance of junior members—No right to partition—No alienation voluntary or involuntary.

Properties given by a person to his wife and children or children alone following the Marumakkathayam law, are taken by the donees with the incidents of tarwad property, persons born into the tavazhi subsequently to the gift being entitled equally with the donees expressly mentioned. Individual members of the tavazhi are entitled to maintenance but are not entitled to claim partition or to alienate their shares nor can such shares be attached and sold in execution of decrees against them.

Per *Srinivasa Aiyangar, J.*—It is not the giving of the properties by a person to his wife and children that constitutes them tarwad, but if properties are given to a wife and children following the Marumakkathayan law they as tavazhi hold those properties with the incidents of tarwad property and the right of management of the properties is vested in the senior male member of the tavazhi *Kunhacha Umma* v. *Kutti Mammi Haji* [1], followed.

Second Appeal against the decree of the Court of the Subordinate Judge of Tellicherry, North Malabar, in Appeal Suit No. 241 of 1909, preferred against the decree of the Court of the District Munsif of Payyoli in Original Suit No. 333 of 1908.

This Second Appeal came on for hearing on Thursday the 24th day April 1913, when the Court (Sankaran Nair and Tyabji, JJ.,) made the following

ORDER OF REFERENCE TO A FULL BENCH:—

Sankaran Nair, J.

Sankaran Nair, J.—The suit out of which this second appeal arises was brought by the plaintiff—appellant for partition and possession of the interest of the 1st defendant which he had purchased in execution of a money-decree obtained by him. The 2nd and 3rd defendants are respectively the brother and niece of the first defendant, and they contend that the first defendant had no such interest in the property as could be attached and sold.

* S. A. No 2078 of 1910. 20th August, 1915

1. (1892) I. L. R. 16 M. 201.

Chakkara Kannan v. Kunhi Pokker.

Sankaran Nair, J.

Their case is that the property is held by them with the incidents of tarwad property. Both the lower Courts have dismissed the plaintiff's suit.

One Pakran made a gift of certain properties to his two sons, 1st and 2nd defendants and a daughter Pathumma, whose daughter is the 3rd defendant. The question for decision is whether they took the property as joint-tenants or tenants-in-common or whether they took it only as members of the tarwad, none of them having any interest liable to be attached and sold. The material portion of the instrument of gift runs thus: "I have settled by this that the properties....................and all dealings in my name and all movables are to be enjoyed by me till my death according to my pleasure and after my death they are to belong to my children, Ammadkutti, (2nd defendant), Kunhi Pokker (1st defendant) and Pathumma, (the mother of the 3rd defendant) and that no one else has any right to my properties. Properties and dealings which I may acquire in future also are for the said children. After my death abovementioned persons, who are my children, are to collect all outstandings due to me and arrears of rent and the assessment which was in my name has to be transferred in the names of my children and patta obtained and they are to hold the same in the same way I was holding them, paying the porappad due to the jenmies and getting renewals in their names." Now there can be scarcely any doubt that, if we look to the terms of the instrument alone, the three donees therein named took an absolute interest and so far as their right of alienation is concerned it makes no difference whether they are tenants-in-common or joint-tenants as in either case any of them could alienate his interest in the property. But it is contended, and the contention has a good deal of force in it, that the decisions have laid down the principle that the donees in such cases must hold the property with the incidents of tarwad property and that therefore Kunhi Pokker, the 1st defendant and one of the donees and the judgment-debtor, had no saleable interest in it.

The case that is mainly relied upon is that of a Full Bench in *Kunhacha Umma* v. *Kutti Mammi Hajee* 1. There were a series of decisions before that on the question of the liability of the interest of one of the donees to be attached and sold—some of them following the case *Narayanan* v. *Kannan* 2, which was

1. (1892) I. L. R. 16 M. 201: s. c. 2 M.L.J. 226. 2. (1884) I. L. R. 7 M. 315.

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a decision to the contrary and others not apparently following it. Many of them will be found reported in the foot-notes to the Full Bench judgment in *Kunhacha Umma* v. *Kutti Mammi Hajee* [1]. *Kunhacha Umma* v. *Kutti Mammi Hajee* [1], was a case in which the properties were given after a person's death by his legal representatives to his widow and her children in accordance with his orally expressed wish, and the question was whether the interest of one of the children could be attached and sold. Mr. Justice Best was of opinion that they held the property as joint-tenants under English Law, as there were all the four unities of a joint-tenancy, that is, (1) of possession (2) of interest (3) of title and (4) of the commencement of such title, and therefore the interest of the judgment-debtor who had died could not be attached and sold. This view cannot be accepted. See the Privy Council decision in *Jogeswar Narain Deo* v. *Ramachandra Dutt* [2]. Mr. Justice Subramania Aiyar contented himself with saying that there was a conflict of decisions and the question was therefore one that should be decided by a Full Bench. The Full Bench delivered the following judgment:—"In the case before us the donor expressed no intention as to how the properties should be held by the donees, and in the absence of such expression, the presumption is that he intended that they should take them as properties acquired by their branch or as the exclusive properties of their own branch, with the usual incidents of tarwad property in accordance with Marumakkathayam usage which governed the donees. This view is in accordance with the principle laid down by the Privy Council in *Sreemutty Soorjeemoney Dassi* v. *Denobundoo Mullick* [3], and *Mahomed Shumsool* v. *Shewakram* [4],—" and they expressed the opinion that the decision above referred to, *Narayanan* v. *Kannan* [5], is in conflict with the rule of construction indicated by the Privy Council. Now it will be observed that in the Full Bench case the judgment-debtor had died and the question whether he left any interest liable to be sold is very different from the question which arises here. Again, there was no instrument of gift and the intention was imputed to the donor only in the absence of any expression of his intention, while in the case before us there is an expression of the donor's intention. The Privy Council judgments have application only to gifts to a

1. (1892) I. L. R. 10 M. 201.
2. (1896) I. L. R. 23 C. p. 670
3. (1856) 6 M. I. A. 520.
4. (1874) L. R. 2 I. A. 7.
5. (1884) I. L. R. 7 M. 315.

Chakkara Kannan v. Kunhi Pokkar. Sankaran Nair, J.

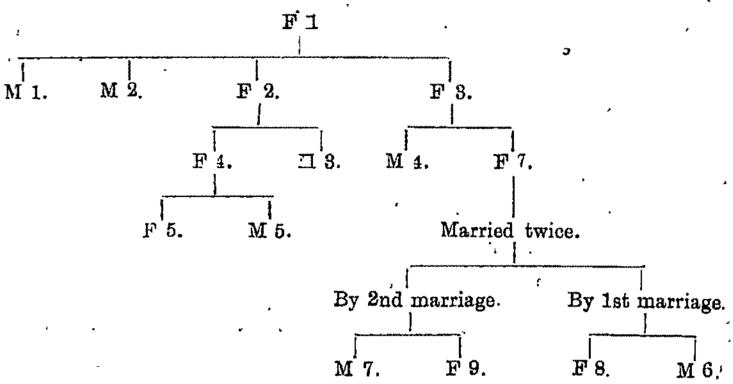
Hindu woman who generally takes only a life-interest. It is the other way in the case of a Malayalam woman, the theory of the Marumakkatayam law being that the property is vested only in the females, the males having only the right of maintenance. For these reasons I should have held without hesitation that the present case is not governed by the Full Bench decision but for the reason that the later decisions of this Court have apparenty included within its scope cases of this kind. It becomes necessary therefore to consider the question more fully.

If it is to be held that the three donees in the case before us, *held* the property with the incidents of tarwad property and that any one of them could not convey his interest, then it would be directly contradicting the terms of the instrument Exhibit I because Exhibit I distinctly recites that the donees were to hold the property 'in the same way I was holding them,' or, in other words, those three persons could alienate it even if such alienation may not be in the interests of the branch to which they belong, which would include the 3rd defendant, a daughter of Pathumma. The will states that no one else besides the three donees named has any right to the properties, whereas, if they belonged to the branch, the descendants of Pathumma born before or after the death of the testator would be entitled to them in their own right and not as representatives of any donee, so that, if we were to decide the case on the construction of the instrument of gift alone, I should have little hesitation in holding that I must give effect to the terms of the instrument and should not import any artificial intention into the case. But the decisions that I have referred to have no doubt held that in such cases the properties must be deemed to be held with the incidents of tarwad property.

The rule of decision is that indicated by their Lordships of the Privy Council in *Jogeswar Narain Deo* v. *Ramachandra Dutt* [1], in which they expressed their dissent from a decision of the Madras High Court reported in *Vydinada* v. *Nagammal* [2], to the effect that, where a Hindu testator devised certain properties to his nephew and his wife, they took them as joint-tenants and the nephew could not sever the joint-tenancy by an alienation by him alone to a creditor. The judicial committee pointed out 'the principle of joint-tenancy appears to be unknown

1. (1896) I. L. R. 23 C. 670: P. C. 2. (1887) I. L. R. 11 M. 258.

to Hindu law except in the case of co-parcenery between members of an undivided family,' and in the second place, even if it is a 'joint-tenancy under English law, that joint-tenancy could be observed by a conveyance or an equivalent of conveyance. According to this, therefore, it is where a co-parcenery might exist according to the rules of the Marumakkattayam law that the property given to certain members of a Marumakkattayam family may be deemed to be held by them as co-parceners. Under that law it is only tarwad property or the property of a branch who hold certain properties as their branch property in the same way as a tarwad with their own Karnavan, etc., that is really held in co-parcenery right. As in my view the right decision of the question mainly depends upon an appreciation of what properties are held as co-parcenery property, I will explain it in some detail.



M 1 the senior male member would be the karnavan of the entire tarwad and in management of all its properties. He is the guardian of the infants or children born to any of the female members, he is bound to look after them, maintain them in the tarwad house and give them the education customary among such tarwads. Any female and her children form a tavazhi or branch. *Tavazhi* literally means, *tayar*, mother, and *vazhi*, line, that is mother's line. Very often a woman and her descendants live apart from the tarwad house in a house of their own with properties belonging exclusively to their branch, the senior member amongst them having all the rights and obligations of the karnavan of an ordinary tarwad. Such a branch or *tavazhi* is constituted or created by gifts from the father of the woman or by gifts from

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a favourite brother or maternal uncle, or, it may be, by the self-acquisition of any member of that branch which he would often reserve for the sole benefit of the members of his branch. The karnavan of the main tarwad does not exercise his rights over the members of this branch or interfere in the management of the exclusive properties of that branch. In all such cases what the interests of that branch are in the main tarwad and its properties have often been discussed. If they wish to preserve their rights, which carry with them their obligations in the main tarwad, then the senior member of that branch when he becomes the senior of the main tarwad also assumes the headship or Karnavanship of the main tarwad. Failure to assume the Karnavanship of the main tarwad when by seniority in age it comes to a member of this tavazhi or branch is usually taken as an indication that it has become a distinct branch without any co-parcenery interests in the main tarwad. Whether the branch members retain their interests in the main tarwad or not, so long as they have a Karnavan exercising over them the ordinary Karnavan's rights, they form a branch tarwad. I take no exception to the Full Bench Judgment in *Kunhacha Umma* v. *Kutti Mammi Hajee* [1], if it goes only to that extent: it was on that footing that the case was argued by me before the Division Bench; the reference to a Full Bench was rendered necessary by a decision which was supposed to throw doubt even on that doctrine.

But let us take a case where a female and her children remain in the tarwad house under the control of their Karnavan and certain properties are given to them by their father. Now there are four possible views. (1) One view is that they constitute a tarwad by themselves with reference to that property. (2) Another view is that those members hold the property in the same way for instance as the members of a Mitakshara family do in Bengal substituting females for males. That is they may be entitled to partition but before partition their interests are not liable to be attached and sold. (3) A third possible view is that they hold in the same way as the properties held by a Mitakshara family according to the Madras decisions, that is they are entitled to partition but their interest also is liable to be attached and sold during their life-time but not after that. (4) Another view is that may be attached and sold even after death.

1. (1892) I. L. R. 16 M. p. 201, s. c. 2 M. L. J. 226.

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I have already stated that, if the *Kunhacha Umma* v. *Kutti Mammi Haiee* [1], case is to be understood as applying to the members of a tarwad who live apart from the main tarwad house holding their own property and having their own karnavan, I accept that decision. Mr. Justice Moore and I have also followed that decision, nor do I see any reason to question it in so far as it holds that the interest of a member cannot be attached and sold after his death.

But, it is said that, according to that decision, even if the members do not form a separate tavazhi holding separate property, they hold the properties gifted to them, (we will say), by the husband of the woman, with all the incidents of a tarwad, &c. Now, what is the position of that group of members? Take it in the table above given the husband of F 7 gives certain property to her and to her children F 8 and M. 6. It cannot be contended for a moment that they are constituted into a separate tarwad or a separate tavazhi, with the tarwad incidents, by themselves, for M 1, the karnavan of the entire tarwad, does not lose his rights over the children F 8 and M 6 if minors, and even F 7 if she is a minor or any children that may be hereafter born to F 7 and F 8. Nor do they lose their corresponding rights in the tarwad house and its property. For the same reason the senior male in that group cannot displace the old karnavan and succeed to his rights over the other members. This view, which Mr. Justice Moore and myself put forward in *Koroth Amman Kutti* v. *Perungottil Appu Nambiar* [2], has been accepted in the subsequent cases which have reference to that doctrine. Now, if they do not constitute by themselves a separate tarwad or tavazhi, is there any reason why to the donor must be imputed an intention that they should hold the property with the incidents of tarwad property? This would lead to startling results. Supposing F. 7 marries again after the divorce by or of the first husband or after his death. Then the children that might be born to her by the second husband, M. 7 and F. 9, would also form the members of the tavazhi to which their mother and her children by her first husband belong, because the mother is the root of the tavazhi and the father has no place in the system, and they (*i. e.*, the children by the 2nd husband) would acquire an interest in the property given by her first husband. It is obvious

1. (1892) I. L. R. 16 M. p. 201, s. c. 2 M. L. J. 226.
2. (1906) I. L. R. 29 M. 322.

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that we cannot impute to the first husband an intention that the children born to his wife by another person should benefit in the gift which he made for her and her children's use. Once it is recognised that a woman with her children by one husband are incapable of forming a tavazhi or joint family by themselves only, to the exclusion of the children that may be born or have been born to her by another husband, it seems necessarily to follow that they do not take as a tavazhi or as co-parceners according to the Privy Council decision in *Jogeswar Narain* v. *Ramachunder Dutt* [1], already referred to. Even in cases of inheritance it has been held by a Full Bench of this Court that the co-parcenery principle does not generally apply, *Karuppai Nachiar* v. *Sankaranarayana Chetty, &c.* [2]; *a fortiori* therefore, in cases of gifts which stand in this respect on the same footing as wills. This is in accordance with the Privy Council decision in *Jogeswar Narain Deo* v. *Ramchandra Dutt* [1], that in the absence of anything to the contrary the donees take as tenants-in-common. Again, the husband may himself be a follower of the Muhammadan Law or of the Hindu Law called in Malabar the Marumakkathayam law of inheritance, and in *Kunhacha Umma* v. *Kutti Mammi Hajee* [3], itself the donor was probably a follower of the Muhammadan law. The Chief Justice and Mr. Justice Wallis in *Pattatheruvath Pathumma* v. *Mannam Kunniyil Abdulla Haji* [4], assumed it to be so and applied it to a case where the father followed the Muhammadan law of inheritance. Now, what reason is there to impute to him an intention that his children should be governed by the incidents of the Marumakkathayam law? If the intention is to be presumed from the general inclination of a person towards a particular sytem of inheritance, then it is almost impossible to presume such intention in the case of a Muhammadan donor, and the reason that I suggest next would show that such a presumption ought not to be made even in any other case.

How does it stand on principle? Ordinarily a karnavan's rights are commensurate with his obligations. He has the custody of the entire property in which all the members of the tarwad are interested, to hold it for the benefit of them all, to maintain them in the family house and to educate them. Now, if the pro-

1. (1896) I. L. R. 23 C. 670, s. c. L. R. 23 I. A. 37.
2. (1903) I. L. R. 27 M. 309, s. c. 13 M. L. J. 398.
3. (1892) I. L. R. 16 M. 20.
4. (1907) I. L. R. 31 M. 228, s. c. 18 M. L. J. 16.

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perties gifted by a father are to be held with the incidents of tarwad property and the senior male member amongst them is to hold it without any right of the other members for partition; what is the result? They are not maintained out of it, because living in the tarwad house they get their maintenance from the karnavan of the entire tarwad and the senior male of their branch has no control in the tarwad house. They are not educated by the senior male of their branch, because the obligation to educate them is on the karnavan of the tarwad. The guardianship of the infants is also in the karnavan of the entire tarwad. I cannot imagine that a person should be in the possession of the property of another in which they are all jointly interested without any obligations towards those others—the only obligation in this case which would be recognised, if this contention is upheld, being that he has to hold them during his lifetime as karnavan to be handed over after his death to the next man to be held in the same way, no other member getting any benefit out of it. I can hardly conceive that any donor would intend that his property should be enjoyed only by the senior male amongst his decendants to the exclusion of others. That senior male might be—and it has often turned out to be—the son of one of the daughters; and his own sons, who might be junior in age to his grandson by one of the daughters, get no benefit in any form whatever; or again, if the donor has only daughters, the property will be held by one of their sons to the exclusion of them all. I do not think that such a result as this is ever contemplated by the Marumakkathayam law which in theory vests the property in females only. It follows from what I have said that we should not uphold the impartibility of such property nor the absolute right of the senior male member to manage the property to the practical exclusion of the others as in an ordinary tarwad property. Such-impartibility without any right of the other members to participate in the enjoyment of its income is undoubtedly against the general feeling of the people. If the decision in *Kunhacha Umma* v. *Kunhi Kutti Haji* [1], leads to this conclusion, then I am of opinion that it should be reconsidered. I think myself that it does not.

Let us see how far the Privy Council case that is relied upon is against this view. That was the case of a gift by will to a daughter-in-law. Their Lordships of the Privy Council made

1. (1892) I.L.R. 16 M. 201.

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the following observations. "In construing the will of a Hindu it is not improper to take into consideration what are known to be the ordinary notions and wishes of Hindus with respect to the devolution of property. It may be assumed that a Hindu generally desires that an estate, especially an ancestral estate, shall be retained in his family; "and it may be assumed that a Hindu knows that, as a general rule, at all events, women do not take absolute estates of inheritance which they are enabled to alienate" *Mahomed Shamrool* v. *Shewakram*[1]. As their Lordships point out a Hindu desires that the estate should be retained in his family. In the case before us there is no such presumption if the donor follows the Marumakkathayam law of inheritance, as he is giving the property to strangers to his Marumakkathayam family. If he is a follower of the Mahomedan or Hindu law, the presumption would be exactly the other way *i. e.*, that the donees should not enjoy it as a Marumakkatayam family Then, their Lordships say that the donor must be taken to have known that the donee in that case, a woman, cannot, as a general rule, take an absolute inheritance. That presumption does not apply, as I have already pointed out to Malabar. On the other hand, no presumption ought to be drawn that his sons other than the senior male are to get scarcely any benefit out of it. I do not think therefore the Privy Council decision compels us to impute any artificial intention to the donor and in particular, when there is an instrument of gift, I am satisfied that we ought to go upon the words of the instrument. It does not of course follow from this that one of these donees may either sell his share or a creditor may attach and sell his interest in execution of a decree. If we follow the Madras decisions in reference to the Mitakshara family, he would be so entitled to do, but if we follow the Bengal decisions, which proceed perhaps upon the true theory of Hindu co-parcenery law, he will not be entitled to do so. Where certain members of Hindu family earn property there is no presumption that they hold it as co-parcenery property.

Similarly it has been held that in the case of followers of Marumakkatayam law also there is no such presumption. *See Govinda Nair* v. *Sankaran Nair*[2].

It is desirable on account of the apparent conflict of opinion

1. (1874) L. R. 2 I. A. 7 at pp. 14 and 15. 2. (1908) I. L. R. 32 M. 351.

that the matter should be settled by a Full Bench. I would therefore refer the following questions to a Full Bench:—

(1) When properties are given by a person to his wife and children or children alone following the Marumakkatayam law, do the donees constitute by themselves a tarwad or tavazhi, and if they do so, is the right of management of the properties forming the subject of the gift vested in the senior male member thereof?

(2) If the first question is answered in the affirmative, whether in such cases the other members of the tavazhi including those who become members of it by birth are entitled to maintenance etc., out of such properties in the same manner as they were entitled before the gift to receive maintenance out of the properties belonging to the main tarwad; and whether they are entitled to partition of the said properties?

(3) Can any one member of the tarwad or tavazhi so constituted alienate his share, or can his interest be attached and sold by a decree-holder in execution of a decree against any one of them?

I have not dealt separately with the following decisions, *Katankandikoma* v. *Sivasankaran* [1] and *Abdula* v. *Chekkootti* [2], *Pattatheruvath Pathumma* v. *Mannam Kunniyil Abdulla Haji* [3], *Kunhamina* v. *Kunnambi* [4], and *Parvathi Kattilamma* v. *Ramachandra Ejaman* [5], as they al may be supported on the ground that the donees in those cases formed a tavazhi living separately from the tarwad under their own Karnavan as practically a distinct tarwad. There is at any rate nothing in the judgment that they were not living as a tarwad by themselves under their own Karnavan.

Tyabji, J:—I agree that the questions mentioned by my learned brother should be referred to a Full Bench. Tyabji, J.

The case of *Kunhacha Umma* v. *Kutti Mammi Hajee* [6], as I understand it, decided, so far as is at present material, that, where the donees are governed by a law under which property must be, or usually is, held with the incidents of tarwad property, there a gift will be presumed, at least in the absence of circumstances showing a contrary intention, to be held by the donees, impressed with such incidents.

1. (1909) 20 M. L. J. p. 134. 2. (1910) 20 M. L. J. 368.
3. (1910) I. L. R. 34 M. 315. 4. (1908) I. L. R. 32 M. 315.
5. (1909) 1910 M. W. N. p. 124 6. (1892) I. L. R. 16 M. 201. (F. B.)

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I had occasion recently to take part in a decision in which a point similar to that with which we have now to deal arose. (See S. A. No. 1415 of 1910.) In that appeal what I intended to take part in laying down was that, when the donor and the joint donees are all governed by the same system of law, *viz.*, the Marumakkattayam, a gift will presumably be governed, and the subject of the gift will, in the hands of the donees, continue to be affected, by the incidents of that law, provided of course that, if that law permits of property being held in two or more different ways, then it will be a question to be determined under which of the various recognised modes of holding property the donees are to hold the subject of gift: the answer to such question necessarily depending on the construction that has to be placed on the terms of the gift. In S. A. No. 1415 of 1910 I understood that the learned pleader who appeared for the appellant before us conceded, first, that the donor and the donees were alike governed by the Marumakkattayam law, secondly, that under that law property had necessarily to be held with the incidents of tarwad property, thirdly, that, assuming that the law in question recognises the holding of property without the incidents of tarwad property, that mode of holding property was rather unusual, and there was nothing to indicate that the subject of gift in that particular case was intended to be held with incidents other than those of tarwad property.

However, my learned brother, to whose experience and knowledge of the subject I need not allude, in his judgment mentions considerations which would throw great doubt on the permissibility of postulating those propositions which form the basis of the judgment in S. A. No. 1415 of 1910. For I gather from the judgment of my learned brother that under Marumakkatayam law itself not only is there no necessity for holding property with the incidents of tarwad property, but, that property cannot be so held unless it is given to or acquired by a tarwad as such, or, in other words, unless, prior to the gift or acquisition, the donees or persons acquiring constitute a tarwad or a tavazhi. I see also the difficulty in holding that a new tarwad or tavazhi should come into being by the mere fact of a gift being made to several persons as joint donees; or that a gift can by itself consitute the donees into a tarwad or a tavazhi. Again it is not very probable that there should be any

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intention on the part of the donor—especially when he is a Mussalman-of so constituting the donees into a tarvad or tawazhi even where the donees are related to each other by being the wife and children of the donor; where the donees are members of different tarwads and bear no relationship to each other, the improbability of there being any such intention would be still greater; further, the question whether, even assuming that the donor intends so to constitute the donees into a new tarwad or tavazhi, the law empowers him to do so, requires careful consideration. The question may also arise, when the rights of the parties have to be determined with reference to a set of circumstances which do not seem to have been contemplated at the time when the well recognised rules of custom arose, nor to have been specifically provided for by rules of custom which are known to prevail, whether in such matters effect out to be given to "logical conclusions which may seem to an acute modern dialectician to follow" from the rules imposed by ancient customs (cf. *Baqar Alikhan* v. *Anjuman Ara Begam* [1]. It may be that in such matters effect ought to be given rather to the ordinary notions and wishes of the parties, even though such notions and wishes may not in strict logic be in conformity with the prevailing customs nor have taken a shape sufficiently definite to be considered as embodying an independent rule of customary law, but may only furnish indications of what justice, equity, and good conscience would require.

On many of the matters involved in this reference (to some of which I have alluded above) I feel that there are not sufficient materials at present available which would enable me to express an opinion.

I therefore agree that the questions mentioned in my learned brother's judgment be referred to a Full Bench.

T. R. Ramachandra Iyer (*N. A. Krishna Iyer* with him) for the appellants: The function of a Court of construction is to construe the gift so as to give effect to the actual or presumed intention of the donor. It is also a rule of construction that Courts should be slow to impute to the donor, an intention to contravene the law. In this case the gift will be void, if it is interpreted as a gift to the Tavazhi and not to the individuals specified. Persons who were not alive at the date of the gift but

1. (1902) I. L. R. 25 A. 236; L. R. 30 I. A. 94.

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who subsequently become members of the Tavazhi would take under the gift, if the gift were valid. It has been held in such a case, the gift would be void as being one to unborn persons. *Bai Diwali* v. *Patel Bechardas* [1], *Kishori Dubain* v. *Mundra Dubain* [2]. The gift must be construed so as to make it conform to the law and limited to the donees in existence at the time. Among Hindus, where there is a gift to two persons, there is no presumption that the donor meant to annex the incident of survivorship. *Jogeswar Narain* v. *Ramachandra Dut* [3], and the cases cited above. A Malabar Tarwad stands on the same footing as a joint Hindu family, with this difference that there is no right to partition.

[*Srinivasayangar J.*—If it is possible to confer property on a Hindu with co-parcenary incidents, why is it impossible to confer property with Tarwad incidents?]

See *Sudarsanam* v. *Narasimhalu* [4]. If the donees form a tavazhi with a Karnavan, then the gift can be presumed to be stamped with Tarwad incidents. In so far as *Kunhacha Umma* v. *Kutti Mammi Haji* [5], lays down that a gift by a husband to his wife and children who are living as members of a Tarwad constitutes a gift to the Tavazhi, I submit it is wrong. It could never have been the intention of the donor in such a case that it should go to the Tavazhi. If the lady married another husband and had children by him, the gift would enure to the benefit of the latter children also, a result which would have been repugnant to the donor *i.e.*, the first husband. *Kunhacha Umma* v. *Kutti Mammi Haji* [5], purports to follow *Soorjee Money Dassi* v. *Deenobundoo Mullick* [6], and *Mahomed Shemshool* v. *Shewkram* [7]. The observations of the Privy Council apply to a Hindu woman who merely takes a life-estate. A Malabar woman on the other hands own the Tarwad property, the males having only a right to maintenance. The presumption in this case is in favour of an absolute gift to the wife and children. Again, the husband, the donor, may be a follower of the Makkathayam or Mahomedan Law. What reason

1. (1902) I. L. R 26 B 445. 2. (1911) I. L. R. 33 A. 665.
3. (1896) I. L. R. 23 C. 670. 4. (1902) I. L. R. 25 M. 149 at 154 & 155.
5. (1893) I. L R. 16 M. 201. 6. (1856) 6 M. I. A. 526.
7. (1874) L. R. 2 I. A. 7.

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is there to impute to him an intention that his children should be governed by the Marumakathayam Law ?

The very object of the gift will be defeated if it were held that the gifted property was tarwad property. The sons of the donor may not have the management of the property, if there is a daughter's son entitled to act as Karnavan. Again the senior male descendant above will have the right of management. If the donor has only daughters, the property will be held by one of their sons to the exclusion of them all. If the tarwad of which the donees are members has property, the donees may never have any occasion to enjoy the gifted property. These anamolies ought to be avoided by holding that the gift in such a case is free from the Tarwad incidents.

J. L. Rosario for the Respondents : This is a case in which the principle of *Stare decisis* ought to prevail. The decision in *Kunhacha Umma* v. *Kutti Mammi Haji* [1], has been followed for the last 22 years and rights have grown up which ought not to be unsettled. The decision itself was right. There is no hardship in holding that property is presumed to be given with Tarwad incidents. For, only then the property has the greatest chance of being conserved in the family. The fact that children by another husband also participate in the gift ought not to weigh much. For even if the gift is to a female alone, the moment she dies all her children including those of the donor take her property.

T. R. Ramachandra Iyer, (in reply). The principle of Stare decisis does not apply to this case. There have been conflicting decisions. See *Koroth Amman Kutti* v. *Perungothil Appu Nambiar* [2], *Ummanga* v *Ramakrishna* [3], *Kalliani Amma* v. *Govinda Menon* [4]. No rights could have grown up in others in view of the fact that the gifted properties have been tied up to the Tarwad, under the doctrine of *Kunhacha Umma* v. *Kutti Mammi Haji* [5].

The Court expressed the following

The Chief Justice.

Opinion :—*The Chief Justice.*—It seems desirable at the outset to point out that the decision of the Full Bench in *Kunhacha Umma* v. *Kutti Mammi Hajee* [1], which is questioned in the

1. (1892) I. L. R. 16 M 201.
2. (1906) I. L. R. 29 M. 322.
3. (1909) I. L. R. 34 M. 387.
4. (1911) I. L R. 35 M. 618.
5. (1892) I. L. R. 16 M. 201.

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reference merely decides that among the followers of the Marumakkatayam law, when a gift is made by the father to the mother and her children, there is a presumption that they are intended to take such properties as the exclusive properties of the branch or tavazhi consisting of the mother and her children, that is to say, with the usual incidents of tarwad property. In the absence of express provision the presumption is that the property is to be enjoyed by the mother and her issue in the way in which property is customarily held and enjoyed among followers of the Marumakkatayam law. The decision proceeded on the authority of two decisions of their Lordships of the Judicial Committee which laid down that the law governing the parties is one of the circumstances to be taken into consideration in ascertaining the intention of the donor. As pointed out in the judgment of one of the judges who made the reference to the Full Bench the presumption was arrived at in consideration of what were known to be the notions and wishes of persons in the position of the donor and also of the ordinary incidents of property in the District. This view was accepted by the Full Bench of four Judges two of whom Muthusawmy Aiyar and Wilkinson, JJ, were well acquainted with Malabar, and that it was well founded is suggested by the fact that the decision has not only been accepted but has been given a considerable extension in the neighbouring State of Travancore, as pointed out during the argument by my learned brother speaking from his experience as Chief Justice of that State. It has also been followed, as I shall show, in numerous cases in this Court, and was not questioned before *Ummanga* v. *Appadurai Pattar* [1] a decision of Sir Arnold White, C. J. and Sankaran Nair, J. in 1910, and it may be taken that many transactions have proceeded on the footing that it was correct. In these circumstances, notwithstanding the respect which I feel for the opinion of Sankaran Nair, J. especially in a matter affecting his own community, I think we should be very slow to differ from the decision of the Full Bench unless we are absolutely obliged to do so, more especially as that decision merely relates to a presumption which it is always in the power of a donor to negative if so minded by express provision. If any change is to be made it should, it seems to me, be made by the legislature.

1. (1910) I.L.R. 34 M. 387.

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As regards the authorities, the decision in *Kunhacha Umma Kutti Mammi Hajee* [1] was not only not questioned but, as pointed out in subsequent cases, was accepted in *Koroth Amman Kutti* v. *Perungottil Appu Nambiar* [2] to which Sankaran Nair, J. was a party. It was followed in *Pathatheruvath Pathumma* v. *Mannam Kunniyil Abdulla Haji* [3], *Kunhamina* v. *Kunhambi* [4], *Katankandi Koma* v. *Thamburankandi Sivasankaran* [5] *Chakkantavida Chakkan Abdulla* v. *Thazuth Cheekkotti* [6], and *Parvathi Kattilammah* v. *Ramchendra Ejaman* [7]. Lastly in *K. P. Kalyani Ammah* v. *K. P. Govinda Menon*, [8] which was subsequent to *Ummanga* v. *Appadurai Pattar* [9] it was again accepted and acted on by Abdur Rahim and Sundara Aiyar, JJ. in a careful judgment in which all the authorities were examined. In this state of things it seems to me that it is not now open to us to question the decision of the Full Bench even if we saw reasons to doubt that it had been correctly decided. "With reference to the observations of their Lordships of the Judicial Committee in *Jogeswar Narain Deo* v. *Ramchandra Dutt* [10] which are referred to by Sankaran Nair, J. that the principle of joint tenancy appears to be unknown to the Hindu Law except in the case of a co-parcernery between members of an undivided family, it may be observed that these observations of their Lordships were made with reference to ordinary Hindu Law and not to the peculiar Marumakkatayam system which was not under their Lordships' consideration. But even taking them to be applicable, I cannot see how a gift to a female and all her descendants in the female line can be held to infringe the principle, for that is the kind of joint family known to the Marumakkatayam system. On the other hand, the propriety of such a gift would appear to be recognised by their Lordships in *Rai Bishen Chand* v. *Mussumat Asmaida Koer* [11] in the passage cited by Benson and Sundara Iyer, JJ., in *Vengamma* v. *Chellammayya* [12]. The question whether a gift with the incidents of tarwad property could be made to the mother and some of her issue only *viz.*, those by a particular husband does not arise in this particular case, as the

1 (1892) I.L.R. 16 M. 201.
2. (1906) I L.R. 29 M. 322.
3. (1907) I.L.R. 31 M. 228.
4. (1908) I.L.R. 32 M. 315.
5. (1910) 20 M. L. J. 134.
6. (1910) I.L.R. 34 M. 245.
7 (1910) M. W. N. 124.
8. (1911) I.L R. 35 M. 648.
9. (1910) I.L.R. 34 M. 387.
10. (1896) I L.R. 23 C. 670.
11. L. R. 11 I. A. 164 at p. 179.
12. (1914) I.L.R. 36 M. 482 s.c. 23 M.L.J. 168.

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gift is to the children of the donor by a deceased wife and it is not suggested that she left any other children. It is, therefore, unnecessary to express any opinion on this point, or to refer to the authorities which are collected in the judgment of Benson and Sundara Aiyer, JJ. just mentioned.

Following the decision of the Full Bench in *Kunhacha Umma* v. *Kutti Mammi Hajee* [1] and the course of subsequent decisions I would answer the question in the reference as follows. (1) The presumption is that the donees take the property with the incidents of tarwad property including those mentioned. (2) Persons subsequently born into the tavazhi are entitled to be maintained but not to claim partition. (3) An individual cannot alienate his share nor can it be attached and sold in execution of a personal decree against any of the members.

Sadasiva Aiyar, J.

Sadasiva Aiyar, J. I am prepared to follow the decision in *Kunhacha Umma* v. *Kutti Mammi Hajee* [1] which is in conformity (so far as I find) with the views universally held by the communities following the ordinary Marumakkathayam law and with the intentions of a father (who might even belong to a Marumakkathayam community) who consorts with a lady belonging to a Marumakkathayam community and who makes or arranges a gift to his children born of his said Marumakkathayam wife.

The objection, based on the rule of perpetuity to the validity of such gifts has been considered elaborately by Sundara Aiyar, J. in *Meda Vengamma* v. *Mitta Chellamayya* [2], and I respectfully agree with his opinion that that rule cannot be applied so as to defeat gifts made to all the persons who can naturally form a joint Hindu family, the gifted property to be held as joint family property or to the whole of a group of person following the natural law Marumakkathayam forming a natural tavazhi group.

The objection based on the woman (whose husband makes a gift to his children by her) marrying another husband and begetting other children to the latter and on these children also belonging to her tavazhi along with her children by the 1st husband is not, in my opinion, insuperable. The result of that state of facts will only be that there will be two separate groups in the same tavazhi holding separate tavazhi property, the senior male in each tavazhi group being the Karnavan of that

1. (1892) I.L.R. 16 M. 201, s.c. 2 M.L.J. 226. 2. (1911) I.L.R. 36 M. 484.

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tavazhi group. For instance, take the case of a woman and her children who form a tavazhi within a Tarwad. Two of her daughters might form two different groups in the same tavazhi and their respective husbands might give properties to their respective children. Then, all these children would belong to the Tarwad of their great-grand-mother, would again belong to their grand-mother's tavazhi and would also belong to the two groups or sub-tavazhis of their respective mothers and hold those respective group properties separately. Just as there can be tavazhis within a tavazhi, there can be group tavazhis and sub-tavazhis in the same tavazhi. If two groups or sub-tavazhis springing from two daughters who form a tavazhi can have separate sub-tavazhi properties, there is nothing startling in two branch tavazhis springing from the same lady through her marrying two successive husbands) and holding separately their respective branch tavazhi properties. A tavazhi consists, no doubt, of the descendants of a single woman (I do not think it includes the woman herself etymologically) but there is nothing to prevent the existence in that same tavazhi of two groups each of which groups *might form a separate unit for the purpose of holding particular properties* as if it was a separate Tarwad and with the incidents of Tarwad property. It cannot be said to be an unnatural separation between the two groups, unnatural in the sense of repugnant to the habits, practices and sentiments of the community. I agree to the answers proposed by my Lord.

Srinivasa Aiyangar, J.

Srinivasa Aiyangar, J:—In India it is not uncommon for groups of persons though not incorporated to hold properties as if they were corporate entities. Castes and sub-castes hold property as such, so also village communities. But the more common and familiar instances of such groups in Southern India are the joint Hindu family governed by the Mitakshara law, the Nambudri Illom governed by the Marumakkathayam law, the Nayar tarwad governed by the Marumakkathayam law, and the Aliyasantan family of South Canara. The Moolas of North Malabar generally follow the Marumakkathayam system and the parties to this suit are governed by that law. The incidents of such groups holding are now well settled. In the case of Malabar Tarwads such incidents include the impartibility of the property, the right by birth of persons born in the Tarwad, and the management

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of the properties by the senior male member of the tarwad who is styled the karnavan.

The constitution of a Marumakkatayam Tarwad is well known and is concisely stated in the extract from the report of the Malabar Marriage Commission in *Raman Menon* v. *Raman Menon* [1]. The constitution of a joint Hindu family governed by the Mitakshara law furnishes a very close parallel (See the description of such a family by Bashyam Iyengar J. in *Sudarsanam Maistri* v. *Narasimhulu Maistri* [2]). These groups cannot of course be created by agreement of parties. The tavazhis or the subordinate groups constituting the tarwad are, I think, capable of holding properties as corporate units with the incidents of tarwad property, at the same time retaining their joint interest in the properties of the main tarwad, just as branches and sub-branches in a Mitakshara joint Hindu family are capable of holding properties with the incidents of Joint Hindu family property. I am also of opinion that some only of the members of a tavazhi cannot form a corporate unit capable of holding property as such. The husbands of the female members and the children of the male members of a tarwad are not members of the tarwad. It is not uncommon for them to make gifts of properties to their wives, daughters or sisters and their children and such properties are called Putravakasam properties. The question is whether, in the absence of express words in the grant, the tavazhi hold them as a corporate unit with the incidents of impartibility and right by birth, or whether the members of the tavazhi hold the property as co-owners *i. e.*, as tenants-in-common. I think these are the only two alternative views possible, and the second and third views mentioned in the referring order of Sankaran Nair, J. may be left out of consideration. (*Jogeswar Narain Deo* v. *Ramachandra Dutt* [3]). This question was answered by a Full Bench of this Court in *Kunhacha Umma* v. *Kutti Mammi Hajee* [4], and the answer was that such properties were held with the incidents of Tarwad property. The basis of the decision was that was the usual mode of holding property by persons governed by Marumakkatayam law; and that the donors presumably intended to benefit not merely the existing members of the family but also those who may there-

1. (1900) I. L. R. 24 M. p. 76.
2. (1901) I. L. R. 25 M. p. 155
3. (1896) I. L. R. 23 C. p. 670.
4. (1892) I. L. R. 16 M. p. 201.

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after be born in the family. This decision was followed in a large number of cases in this Court, *viz.*, *Koroth Amman Kutti* v. *Perungottil Appu Nambiyar* [1], *Pattatheruvath Pathumma* v. *Mannam Kunniyil Abdulla Hajee* [2], *Mooriyat Peetikayil Kunhamina* v. *Mooriyat Peetikayil Kunhambi* [3], *Katankandi Koma* v. *Thamburamkandi Siva Sankaran* [4], *Chakkantavida Chakkan Abdulla* v. *Thazhath Cheekkotti* [5], *Parvathi Kattilamma* v. *Ramchendra Ejaman* [6], *Kunhiraman* v. *Kunhi Parvathi* [7], and *K. P. Kalyani Amma* v. *K. P. Govinda Menon* [8].

For the first time, in *Ummanga* v. *Appadurai Pattar* [9], a suggestion was made that if a tavazhi had not become a distinct Tarwad by division or relinquishment of its joint interest in the properties of the main Tarwad, the property held by that tavazhi will not have the incidents of Tarwad property; and the Full Bench decision in *Kunhacha Umma* v. *Kutti Mammi Haji*[10], was explained as deciding only that the interest of a member of such a tavazhi lapsed to the other members of the tavazhi, if that interest has not been alienated during his life-time. With the greatest respect to the learned Judge I am unable to accept this explanation. It ignores the fact that in properties held with the incidents of Tarwad property no individual member has an alienable interest. It is to be observed that Sankaran Nair, J. who was one of the Judges who decided that case, at that time seems to have been of opinion that it is only in cases where a tavazhi becomes a distinct Tarwad by ceasing to have any interest in the properties of the main Tarwad, that it can hold properties with the incidents of Tarwad property; but in the order of reference the learned Judge concedes that the rule would apply even in cases where the tavazhi retains its interest in the properties of the main Tarwad, provided that the members of the tavazhi live separate from the other members of the Tarwad. He thinks that the case in *Kunhacha Umma* v. *Kutti Mammi Hajee* [1] was a case of that sort. In any case he thinks that decision should not be extended to tavazhis whose members do not live separately with a separate karnavan of their own. In the Full Bench case in

1. (1906) I. L. R. 29 M. 322.
2. (1907) I. L R. 31 M. 228.
3. (1908) I. L. R. 32 M. 315.
4. (1910) 20 M. L. J. 134.
5. (1910) 20 M. L J. 368.
6. (1910) M. W. N. 124.
7. (1910) M. W. N. 642.
8. (1911) I. L. R. 35 M. 648.
9. (1908) I. L. R 31 M. 387.
10. (1892) I. L. R. 16 M. 201.

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Kunhacha Umma v. *Kutti Mammi Hajee*, [1] so far as one can gather from the report, the tavazhi do not seem to have been living separate with a separate Karnavan of their own. In many of the cases which followed the Full Bench decision, the members of the tavazhi do not appear to have lived separately with a separate Karnavan. I am unable to see how the fact of separate living by the members of a tavazhi without a separation in interest can possibly affect the capacity of the tavazhi to hold property or the incidents of the property held by them as such tavazhi. In *Krishnan Nair* v. *Damodaran Nair* [2] a Full Bench of this Court decided that where a female member of a Tavazhi dies, her separate property is inherited by her tavazhi as such *i. e.*, as a corporate unit. Though in *Kuttaseri Eriat Govindan Nair* v. *Sankaran Nair* [3] it was held by two judges of this Court, a third Judge dissenting, that the separate property of a male member of a tavazhi on his death lapses to the Tarwad and not to the tavazhi, the opinions collected in the referring order in that case show clearly the consciousness of the people that the tavazhi was a separate entity which ought to inherit the property of both the male and female members of that tavazhi. In a case where the tavazhi succeeds to the property of a deceased member, that property will be managed, I assume, by the senior male member of that tavazhi and the members of that tavazhi will have the additional advantage of participating in the income of that property. I see no difficulty in the tavazhi holding the properties to which it succeeded with the incidents of Tarwad property.

Two points are taken by Sankaran Nair, J. in the order of reference. One, that a tavazhi which has not separated itself in the sense mentioned above cannot cease to be under the control of the Karnavan of the tarwad and cannot have a karnavan of its own; and the other, that a tavazhi may consist of children of different fathers. In *Koroth Ammankutti* v. *Perungottil Appu Nambiar*, [4] Moore and Sankaran Nair, JJ. had no difficulty in holding that Puthravakasam property held by a tavazhi was held with the incidents of tarwad property though the mere gift of property to a Tavazhi did not constitute them a distinct tarwad. In *Kalyani Amma* v. *Govinda Menon* [5] all the previous cases were considered by Abdur Rahim, and Sundara Iyer, JJ., and the

1. (1892) I.L.R. 16 M. 201. 2 (1913) I.L R. 38 M 48. s.c 24 M L.J. 240.
3. (1908) I L.R. 32 M. 351. 4. (1906) I.L.R. 29 M. 322.
5. (1908) I.L.R. 32 M 648.

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relation of the senior male member of a tavazhi managing the properties of the tavazhi to the other members of the tavazhi was indicated. They say "there can be no doubt that he cannot have all the rights of a Karnavan over the junior members of his Tarwad. He is not their guardian and has no right of supervision of control over them. He is not responsible for their protection, education or maintenance. His right is confined to the management of the special property owned by him and the other members of his branch." I do not think that a tavazhi is not a separate Tarward with a separate Karnavan of its own, is an impediment to their holding property with the incidents of Tarwad property. As regards the second point there is of course the possibility of a woman to whom properties are given by one husband marrying another and having children by him. All the children of that woman would form members of her tavazhi. It is certainly difficult to presume an intention in the first husband to grant the property to his wife's children by another husband. Such cases are likely to occur very rarely. After all the rule is one of construction and even if the decision in *Kunhacha Umma* v. *Kutti Ammi Hajee* [1] is open to question (I think it is not) we ought not to depart from it after it has been followed for such a long time.

It is now necessary to notice another contention of Mr. Ramachandra Iyer which does not seem to have been put forward before the referring Judges. He contends that no gift or grant of property can be made to a Tarwad so as to enable it to hold that property with the incidents of Tarwad property; such a grant, he contends, amounts to a grant in favour of unborn persons and therefore contrary to the decision of the Privy Council in the *Tagore* case. I understand him to concede that a Tarwad could purchase properties and hold them with the incidents of Tarwad property. If they can do that, I do not see why they should not take a gift and hold the properties with the incidents of Tarwad property. The fallacy underlying the argument is that the grant is a grant made in favour of unborn persons. The gift is made to the entity which is called the Tarwad or Tavazhi and the law governing the parties regulates the mode of succession and enjoyment. Mr. Ramachandra Iyer relied on a *dicta* of the

1. (1992) I.L.R. 16 M. 201.

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Bombay High Court in *Bai Diwali* v. *Petal Becherdas* [1], and on *Kishori Dubain* v. *Mundra Dubain* [2]. There is nothing in the Allahabad case to support his contention, and the passage in *Bai Diwali* v. *Petal Becherdas* [1], is only any expression of doubt. On the other hand, the decision in *Meda Vengamma* v. *Mitta Chellamayya* [3], supports the contrary conclusion.

My answer to the first question is that it is not the giving of properties by a person to his wife and children that constitutes them a Tarwad or Tavazhi but that if properties are given to a wife and children following the Marumakkatayam law, they as a Tavazhi hold those properties with the incidents of Tarwad property, and the right of management of the properties is vested in the senior male member of that Tavazhi.

I answer the first part of the second question in the affirmative, and second part in the negative.

I answer the third question in the negative.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Mr. Justice Sadasiva Aiyar and Mr. Justice Napier.

Thandavaroya Mudali minor by next friend Munisami Mudali. ... *Appellant* * *(Respondent 2nd Deft.)*

v.

Subramania Gurukkal ... *Respondent (Petitioner—Plaintiff).*

Thandavaroya Mudali v. Subramania Gurukkal.

Civil Procedure Code O 21, R 35—Symbolic delivery of possession—Obstruction by third person, to actual possession—second application.

A decree holder is not entitled to file a second application for possession under O. 21, R. 35 Civil Procedure Code after he is once put in possession in accordance with an order passed on a previous application filed under the same order and rule.

Gopal Das v. *Than Singh* [4], followed.

Appeal against the order of the District Court of North Arcot dated the 16th April 1914, in A. S. No. 37 of 1914, preferred against the order of the Court of the District Munsif of Ranipet in E. P. No. 382 of 1913 in O. S. No. 195 of 1911.

In O. S. No. 195 of 1911, on the file of the District Munsif's Court of Ranipet, the plaintiff obtained a final decree for redemption of a mortgage, on 16—4—1912. Afterwards, on 19—6—1912, the plaintiff applied in execution for actual possession of the suit

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* A. A. A. O. No. 99 of 1914. 17th August 1915.

1. (1902) I. L. R. 26 B. 445.
2. (1911) I. L. R. 33 A. 665.
3. (1912) I. L. R. 35 M. 484.
4. (1882) I. L. R. 4 A. 184.

lands under O. 21 r. 35 of the Civil Procedure Code. Possession was delivered by the Court Amin on 26—6—1912 and the plaintiff granted a delivery receipt and entered up satisfaction. On 21—4—1913 the plaintiff put in a fresh execution application under O. 21 Rr. 35, 36 and 97 of the Civil Procedure Code, praying for the removal of the obstruction caused by a third person on behalf of the judgment-debtor, and for delivery of actual possession of the suit lands. The District Munsif held that such an application was not sustainable and dismissed it. On appeal, the District Judge held that it was competent to the plaintiff, decree-holder, to make a fresh application for execution and for delivery of possession and directed that the application of 21—4—1913 should be disposed of according to law. Against this order, there was an appeal.

Thandavaroya Mudali v. Subramania Gurukkal.

N. Rajagopalachari for Appellant.

S. Varadachariar for Respondent.

The Court delivered the following

Judgment:—Following *Gopal Das* v. *Than Singh* [1], and the ratio decidendi in *Govind* v. *Venkata Sastrulu* [2], we hold that the decree-holder is not entitled to file a second application for possession under O. 21, R. 35, Civil Procedure Code, after he had been put in possession in accordance with an order passed on a previous application filed under the same order and rule.

The District Judge's order is set aside and that of the District Munsif restored with costs in all Courts on the respondent. We decline to allow the respondent to treat his petition as a suit at this late stage.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Mr. Justice Spencer and Mr. Justice Seshagiri Aiyar,

Sundaram Iyer and others ... *Appellants * sons and legal representative of the Defendant.*

v.

Kulathu Aiyar ... *(Respondent—Plaintiff.)*

Madras Estates Land Act—Lessee of Estate — Expiry of lease—Right to attach and sell ryot's holding -Right to attach movables—Landholder—Applicability of the term to—First charge—not available.

The lessee of an Estate to whom arrears of rent are due cannot attach and sell the holding of the ryot under the Estates Land Act after the expiry of his lease.

Forbes v. *Maharaj Bahadur Singh* [3] referred to.

Sundaram Iyer v. Kulathu Aiyar.

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* S. A. No. 237 of 1914. 1st September, 1915.

1. (1882) I. L. R. 4 A. 184.
2. (1907) 17 M. L. J. 598.
3. (1914) I. L. R. 41 C. 926. 27 M. L. J. 4.

Sundaram Iyer v. Kulathu Aiyar.

Per Spencer J:—His only remedy is to sue the tenants on their contract to pay rent. *Per Seshagiri Aiyar J*:

1. A person to whom arrears are due is a landholder notwithstanding the fact that his estate has terminated (Spencer J. *contra*).

2. The law does not give him a first charge on the holding.

3. He can distrain the movable property or the trees in the holding of the defaulter (Spencer J. *contra*).

Second Appeal against the decree of the District Court of Tinnevelly in A. S. No. 111 of 1913 preferred against the decree of the Revenue Divisional Officer of Shermadevi in S. S. No. 6 of 1912.

M. D. Devadoss and *V. S. Govindachariar* for appellants.

S. Ramaswami Aiyar for respondent.

M. D. Devadoss for appellants. My client is a landholder within the meaning of S. 3. cl. 5, because he is entitled to collect rent. It is not required that he should have a present interest See. S. 111. If the Lower Courts view is right, I am deprived of a remedy either in the Revenue Court or Civil Court. The position is same as if the Landlord himself transferred his interest to another. He can collect his dues.

S. Ramaswamy Aiyar for respondent. My position is that Appellant is not a landholder according to S. 3 cl. 5. He is not entitled to collect rent but only arrears of rent. Rent is what is accruing due and the Act distinguishes between the two terms See. S. 60. The first portion of S. 3 cl. 5 implies that a person who owned any interest is not a landholder. The same meaning should be given to the other portion of the section. "Transfer" in S 3 cl. 5 should be understood as a subsisting transfer. The right given by S. 3 is only a means of enforcing the first charge given by S. 5. There cannot be a first charge in favour of two persons. The Privy Council has decided that the first charge is in favour of the landholder in possession; *Forbes* v. *Maharaj Bahadur Singh* [1]. See also *Ram Prasad* v. *Ram Charan Singh* [2], and *Srimant Roy* v. *Mahadeo Mahata* [3] chapter VIII of the Bengal Tenancy Act is practically reproduced in our Act. The subsequent lessee in this case can also apply under S. 111 after a year for the first year's arrears and if the appellant put off applying till the end of Fasli 1322, there will be a conflict of two attachments for which the Act provides no solution. If the landholder in possession manages to have his sale first then the balance of the sale

1 (1914) I. L. R. 41 C. 926. 27 M. L. J. 4. 2. (1915) 27 I. C. 601.
3 (1904) I. L. R 31 C. 550.

Sundaram Iyer v. Kulathu Aiyar.

proceeds goes in discharge of the further rent due to him under Section 127. The older landholder gets nothing. The difficulty is greater in the case of distraint under Section S. 77 etc., since the landholder can during the current revenue year proceed to distrain for arrears as they fall due. Moreover as soon as there is a sale, it is free of all incumbrances. S. 125. In *Ramasawmi* v. *Bhaskarasami* [1] the Privy Council decided that there must be a subsisting interest for proceedings under S. 8 and 9 of the Rent Recovery Act of 1865.

M. D. Devadoss in reply. The Privy Council decision in *Forbes v. Maharaj Bahadur Singh* [2], is inapplicable. There is no provision corresponding to S. 148 (*h*) in our Act. S. 200 of the Madras Act implies that there can be a landholder out of possession. The definition of landlord in the Bengal Act is also different. No conflict can arise between two attachments, and if one arises, S. 3 cl. 5 empowers the Collector to decide as between the two. The difficulties pointed out by the Privy Council do not exist here.

The Court delivered the following

Spencer, J.

Judgments:—*Spencer J.*—The question which we have to decide is whether a land-holder in Madras who has ceased to be a land-holder can recover rent for the years when he was a land-holder by bringing the ryots' holding to sale under the provisions of Chapter VI of Madras Act I of 1908. For Bengal it has been decided by the Privy Council with reference to the Bengal Tenancy Act that he cannot (*Vide Forbes v. Maharaj Bahadur Singh* [2]). The Madras Estates Land Act is modelled on the Bengal Tenancy Act. Therefore the above decision must have great weight with us so far as it is based on provisions which have been repeated in the Madras Act. There are, however, several distinctions between the two Acts. In Bengal a Landlord must bring a suit and obtain a decree before he can bring to sale the tenant's holding. In Madras he can proceed summarily to attach the holding by notice to the defaulter served through the Collector, provided that he has exchanged a patta and muchilika with the ryot or tendered him such a patta as he was bound to accept. S. 5 of Madras Act I of 1908 and S. 65 of the Bengal Act VIII of 1885 both declare that the rent shall be a first charge upon the holding. S. 109 of the Madras Act provides for the case of a conflict

1. (1879) I. L. R. 2 M. 67.   2. (1914) I.L.R. 41 C. 926 s.c 27 M. L. J. 4.

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—
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between the right of a landholder distraining produce and the right of a Civil Court decree-holder by declaring that the landholder's right shall prevail, but this does not apply to the case of a land-holder selling the ryot's holding. As, in Madras, he does not occupy the position of a decree-holder there can be no competition from other decree-holders for rateable distribution of the proceeds of the sale.

S. 148 clause (h) of the Bengal Tenancy Act which declares that "notwithstanding anything contained in S. 232 of the Civil Procedure Code, an application for the execution of a decree for arrears obtained by a landlord shall not be made by an assignee of the decree unless the landlord's interest has become and is vested in him, does not find place in the Madras Act. Thus one strong argument for the position that the right to sell the holding for arrears is vested in the landholder *qua* landholder is wanting. The Privy Council decision dwells on the anomaly, which would arise by two persons, the landlord and the ex-landlord, having simultaneously a first charge on the tenure, and it goes so far as to class the ex-landlord as an outsider.

This anomaly would present no real difficulties in Madras. Under Section 111, a landholder cannot sell the holding for arrears until the revenue year in which they became due is over and he has under S. 112 only one year in which he can take this step. Unless proceedings begun by one landholder were still going on when the succeeding landholder wished to sell the holding for the rent of the following year, there would be no conflict of interests. Even after the sale of the holding the purchaser would be liable for the rent of the year in which he was in occupation. In case of a dispute between two or more rival claimants to the title of landholder S. 3 (5) provides that the person who shall be deemed to be landholder for the purpose of this Act is the person whom the Collector may recognise or nominate as landholder. Again, when there is an intention to distinguish between landholders in possession and other landholders who have no subsisting interest, the Madras Act speaks distinctly of land-holders in possession (vide S. 200). This may be used as a not very convincing argument that where the word 'landholder' occurs in the Act without qualification, it includes persons out of possession.

I will now consider whether there are any other indications within the four corners of the Act that landholders have, as in

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Bengal; no right to proceed against their ryot's holding, unless their interest as landholder subsists at the time.

It is provided in S. 53 that the remedy of landholders against the ryot's movables and holdings under Chapter IV of the Act is only available to those landholders who have exchanged a patta and muchilika with their ryots or have tendered them such a puttah as they were bound to accept, or there must be a valid puttah or muchilika continuing in force. Can it be said that a valid puttah or muchilika continues in force between a ryot and a landholder who has ceased to have any subsisting interest in the estate? If the answer is 'No, but he is a person who has exchanged or tendered a puttah under the first part of S. 53,' we must then look to S. 52 and we find this section declaring that no ryot shall be bound to accept a puttah for a period of more than one revenue year and that puttahs and muchilikas accepted or exchanged for any revenue year remain in force only until the commencement of the revenue year for which fresh puttahs are accepted or exchanged.

Under the old Act (VIII of 1865) it was recognised by the Privy Council in *Ramaswami* v. *Bhaskarasami* [1] that there must be a subsisting relation of landlord and tenant for the exchange of pattah and muchilikas. The result therefore is that distraint and sale are remedies open only to landholders who have at the time of exercising this power a valid puttah in force between themselves and their ryots. I am aware that in his commentary on the Act Mr. V. Ramadoss takes a different view, but the illustration which he gives to make the matter clear begs the whole question.

Again in S. 3 (5) a landholder is defined as "a person owning an estate or part thereof and it is doubtful if he can lay claim to be called such a landholder merely because at some previous date he has owned an estate. If, as in this case, he is a lessee and comes within the description of a person 'entitled to collect the rents of the whole or any portion of the estate, by virtue of any transfer from the owner,' there can be no reason for imputing to the legislature an intention to create in favour of such persons rights of greater extent and duration than those which are declared to be the property of owners who are landholders in their own right.

1. (1879) I. L. R. 2 M. 67 at p. 73.

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I am therefore of opinion that the lower courts were right in their conclusions that, as the defendant was not the lessee for fasli 1322 he could not attach the plaintiff's lands for the arrears of fasli 1321. In such cases the only remedy left to the ex-landholder is the right of suing upon his contract for rent.

This second Appeal is dismissed with costs. The memo of objections is also dismissed with costs.

Seshagiri Aiyar, J.

Seshagiri Aiyar J.—Vagaikulam is an inam village belonging to the Vyasaraya Mutt. The defendant had a lease of it from the mutt for ten years up to the end of fasli 1321. His son became the lesssee in fasli 1322. The plaintiff who is a ryot of the village is alleged to have made default in the payment of rent for fasli 1321. In or about September 1912, the defendant attached the plaintiff's holding for the arrears. This suit is to raise the said attachment. The only question for decision is whether the defendant who had ceased to be the lessee from July 1912 can attach the defendant's holding for the rent due to him while he was the lessee. There is no question that the defendant was a landholder up to the end of fasli 1321. See *Perraju Garu* v. *Subbarayudu* [1]. It is also undisputed that the lessee who succeeded the defendant was a landholder at the time when the attachment was made.

After hearing the matter argued very fully on both sides and having regard to the grounds of the decision in *Forbes* v. *Maharaj Bahadur Singh* [2], I have, though not without hesitation, come to the conclusion that the defendant had no right to enforce the attachment of the plaintiff's holding in September 1912. The reasoning of the Judicial committee in *Forbes* v. *Maharaj Bahadur Singh* [2], applies to this case, although as I shall presently show, the provisions of the Act which the Privy Council had to construe differ in some material respects from the Estates Land Act. The definition of "landholder" would apply in my opinion, to the defendant.

The somewhat hypercritical comments of the learned Vakil for the respondent on the language of S. 3 (5) have not convinced me to the contrary. He laid stress upon the phrase "owing an estate" and argued that it predicates a subsisting interest at the time of the attachment. The next clause "entitled to collect the rents" would certainly apply to the man whose lease had expired,

1. (1911) I. L. R 36 M, 126. 2. (1914) I. L. R. 41 C. 926.

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but to whom arrears were still due. I do not think that the word "owning" was intended to negative the rights of persons who *owned* the estate at the time the arrears fell due. Another argument which belongs to the same category is the distinction sought to be made between *rent* and *arrears of rent*. I am of opinion that the defendant was a land-holder when he attached the holding. One has only to look at S. 200 of the Act to see that the Legislature in Madras contemplated the existence of land-holders, with co-ordinate or mutually exclusive rights. It is different in Bengal. The definition of "Landlord" (it is not landholder) is that he is "a person immediately under whom a tenant holds." This would undoubtedly exclude the defendant in Bengal. So far as I am able to see, there can be but one landlord at a time in Bengal, although there may be a proprietor and a landlord. There is no provision in the Bengal Tenancy Act corresponding to S. 200 of our Act which limits the power of the *Land-holder in possession*. Consequently the observation of the Judicial Committee in *Forbes* v. *Maharaj Bhadur Singh* [1], that there can be but one landlord cannot apply to conditions which obtain in Madras.

It seems to me that to hold that on the expiry of the lease, the lessee has no right of distraint would render nugatory the provision of the Act. S. 77 and 111 make it clear that distraint proceedings should be commenced only if the rent due during the next proceeding twelve months remains unpaid." These sections do not impose the further restriction that at the time of the distraint, the distrainer must be the sole landholder. As proceedings of this kind are prohibited during the year that rent falls due, it seems to me that the Legislature contemplated action being taken by the person who had the estate when the arrears fell due. On the other hand, the Bengal Legislature confers the right to distrain only on the person in whom the estate vests at the time. S. 148 (*h*) prohibits an assignee of a decree from distraining unless the estate itself is transferred to him. There is no corresponding provision in the Madras Act. I do not think that the fact that in Bengal distraint proceedings have to be taken after decree in a Civil Court affects the question. My conclusion upon this portion of the case is that the defendant was entitled to distrain.

1. (1914) I. L.R. 41 C. 926; s.c. 27 M. L. J. 4 (P. C.)

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The third question is could he distrain the plaintiff's holdings? It is here that the *ratio decidendi* of the Privy Council decision affects the defendant. In the Madras Act, there is a provision for the landholder distraining the general movable property of the defaulter. See S. 77. In S. 121 of the Bengal Tenancy Act which corresponds to S. 77, this power is not given. In Madras (*a*) the holding (*b*) the crops on the holdings (*c*) the ordinary movable property of the tenant (*d*) the trees on the holding subject to specified exceptions can be distrained.

In Bengal the distraint can only be with reference to (*a*) and (*b*). Therefore, if in the present case, the defendant had distrained the movable property or the trees I would have held that the proceedings were not illegal. Both the landholders have the right to distrain these properties. In the case of the holding itself, S. 5 of the Madras Act and S. 65 of the Bengal Tenancy Act give the landholder or the landlord, as the case may be, a first charge for the rent due. In Madras, the first charge extends to the crops on the holding as well, but although in Bengal the crops can be distrained, the rent is not made a first charge on them. This right of *first charge* must be taken to have been given only to the landholder who has a subsisting interest. See *Ramasami* v. *Bhaskarasami* [1]. There would certainly arise a conflict of interest in the case of the holding being attached by two persons.

The lessee that has passed out may not take action until the very end of the second year. The lessee in possession may commence proceedings in the beginning of his second year. As some time must elapse before the holding is brought to sale, the question will have to be dealt with whether both or either of them had the right to attach and whose rights should take priority. It was argued that this dispute can be settled by the collector under the second clause of S. 3 (5) of the Estates Land Act. I think the clause would only enable the collector to recognise one of the two claimants as the landholder. It would not authorise him to decide the question of priority regarding the rights of two landholders. The Judicial Committee in the Calcutta case point out in more than one place that the right to distrain the holding is dependent upon the right of first charge. It is also pointed out that "to acquire the right which the section

1. (1879) I. L. R. 2 M. 67 (P.C.)

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gives, not only the person obtaining the decree must be the landlord at the time, but the person seeking to execute it by sale of the tenure must have the landlord's interest vested in him." Again we have this strong expression of opinion. "In whose decree and on whose application is the tenure to be sold? The question admits of only one answer that it is the existing landlord alone who can execute the decree; the ex landlord is an outsider, and, whilst he can execute his decree against the debtor as a money-decree, he has no remedy against the tenure itself." The expression "existing landlord" and ex landlord may not be appropriate to designate the position of the two landholders in Madras, but there is no doubt that the Judicial Committee have clearly and emphatically laid down that a holding can be sold only by the landlord who has a subsisting interest in the estate. The language of S. 127 of the Estates Land Act is in favour of this position. Under clause (*c*), if the holding is sold, the person to whom the arrears were due the previous fasli gets no portion of it. The arrears payable under clause (*b*) will go to the attaching landholder and not to the person whose interest had ceased. I must therefore conclude that the holding can be attached only by the landholder who has the estate still in his possession.

As I have discussed the sections at some length, I may restate my conclusions thus:

1. A person to whom arrears are due is a landholder, notwithstanding the fact that his estate has terminated.

2. The law does not give him a first charge on the holding.

3. He can distrain the movable property or the trees on the holding of the defaulter.

4. He is not entitled to attach the holding.

These propositions will reconcile the provisions of the Estates Land Act with the decision of the Judicial Committee in *Forbes v. Maharaj Bahadur Singh* [1]. The Second Appeal must be dismissed with costs. The memorandum of objections must also be dismissed with costs.

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1. (1914) I. L. R. 41 C. 926.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Seshagiri Aiyar and Mr. Justice Napier.

Sankaralinga Moopanar and others. *Appellants* * *(Defendants) 3, 4, and 5, in S. A. No. 2523 of 1913*

v.

T. V. Subramania Pillai and another. *Respondents (Plaintiffs)*

and

T. V. Subramania Pillai and another. *Appellants (Plaintiffs) in S. A. No. 290 of 1914*

v.

Ramasawmi Moopanar and others. *Respondents (Defendants).*

Madras Estates Land Act, S 151, 152—Compensation in lieu of ejectment—No severance of relationship of landlord and tenant.

Payment of compensation under S. 152 of the Estates Land Act, in lieu of ejectment does not sever the relationship of landlord and tenant between the parties, the compensation being only for the injury done to the landlord by the wrongful conversion and not for the severance of the relationship.

Second Appeals against the decree and judgment dated 18-9-13 of the District Court of Tinnevelly in A. S. No. 236 of 1912 preferred against the decree of the Court of the Revenue Divisional Officer, Koilpatti, in Summary Suit No. 120 of 1911.

C. S. Venkatachariar for Appellant.

N. Rajagopalachariar for Respondent.

The Court delivered the following

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Judgments:—*Seshagiri Aiyar, J.*—The plaintiffs as trustees of a temple sue to eject the defendants. The allegation in the plaint is that the defendants erected a house upon a portion of the holding and are therefore liable to be evicted. The Suit Collector dismissed the suit. In appeal the District Judge came to the conclusion that the erection of the building by the tenants impaired the value of the land and rendered it substantially unfit for agricultural purposes; but instead of passing decree in ejectment he directed compensation to be paid to the landlords under S. 152 of the Estates Land Act. Both the tenants and the landlords have appealed to this Court.

In the appeal by the tenants it is argued that as the building was erected only on a small portion of the holding the finding that the whole land has been rendered unfit for agricultural purposes is unsustainable. As was pointed out by the Judicial Committee in the

* S. A. No. 2523 of 1913 and 290 of 1914. 3rd August, 1915.

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case *Hari Mohan Misser* v. *Surendra Narayan Singh* [1], it is the Court which has jurisdiction to weigh evidence that must find whether the land has been rendered unfit for agricultural purposes. As the Court of Second Appeal we are bound by that finding. We therefore accept the conclusion of the District Judge which is unambiguous. Moreover there is no issue as to on what portion of the holding the building was erected and whether that erection prejudiced cultivation in other portions of it. Another objection taken by Mr. Venkatachariar is that the holding is held in severalties by the brothers and that the act of waste committed by one of them should not entail liability to ejectment on the others. There is no finding that this division of the holding was assented to by the landlords or that they received separate rents from each of the individual tenants in respect of the portion in his occupation. Unless these conditions are satisfied S. 145 of the Estates Land Act cannot be invoked in favour of the tenants. We must overrule this contention also.

On the question of the compensation which has been awarded, both parties have raised objections. In the view I am disposed to take of this case, that question will have to be remanded for further consideration to the Lower Appellate Court.

In the appeal by the landlords the trustees, it was first argued by Mr. Rajagopalachariar that the alternative remedy of compensation is not available to the tenants as a permanent house was constructed by them. Reliance was placed upon two decisions of this Court in *Ramanadhan* v. *Zamindar of Ramnad* [2], and *Orr* v. *Mrithyunjaya Gurukkal* [3] for this proposition. In the first of these cases which was a suit for injunction restraining the tenant from further proceeding with the contemplated erection of the building, the learned Judges held that the landlord was entitled to that relief. The observation in the Judgment that "there is no definite standard by which the compensation that ought to be awarded for prospective injury can be measured" should not be construed as meaning that in all cases where a building has been erected, damages will not afford adequate relief in lieu of ejectment. In the second case the learned Judges came to the conclusion that the injury was incapable of being compensated. That was arrived at with reference to the

1. (1907) I. L. R. 34 C 718.
2. (1893) I. L. R. 16 M. 407.
3. (1901) I. L. R. 24 M. 65.

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facts of that case: The learned Judges do not lay down that in all cases where a building is erected on agricultural land, the only remedy open to the landlord is to evict the tenant. Whatever may have been the view prior to the passing of the Estates Land Act, Ss. 151 and 152 of that Act put the matter beyond controversy. Under S. 152, if the court is satisfied that the tenant can be relieved from liability to ejectment by awarding against him some pecuniary compensation the Court should adopt the latter course. There is no differentiation between the erection of a building and any other act of waste. I am clearly of opinion that under the Estates Land Act it is open to the courts to award compensation in lieu of ejectment in all cases of waste. The more serious question is this:—Whether the compensation mentioned in S. 152 is to be regarded as putting an end to the relationship of landlord and tenant, so that the money value paid by the tenant renders the building and the site on which it stands the absolute property of the tenant? The compensation awarded in this case proceeds on the footing that from the date of its payment the tenant is to have absolute right to the property. I do not think that the act contemplates the severance of the relationship of landlord and tenant by the grant of compensation. It would amount to the compulsory purchasing out of the landlord, if he is asked to accept a money payment in this way. The words of S. 152 which relate to this question are: "The decree shall provide that, if within one month from the date thereof or such further time as the Collector for reasons to be recorded may allow, the ryot does not repair the damage or pay as compensation a a sum which shall be fixed by the Collector and specified in the decree, he shall be ejected." Now, the repairing of the damage at the expense of the tenant would still continue the relationship of landlord and tenant, and why should the award of compensation terminate such relationship? The use of the two clauses in the same context shows that in both cases the relationship is to subsist. The intention of the legislature is to give an indulgence to the tenant to remain on the property, notwithstanding the act of waste he has committed, and for this purpose he is to be directed to pay compensation for the injury he has done to the property. The compensation should be fixed on the basis that a tortious act was committed by the tenant upon the holding and not as if the landlord is to be purchased out of his right by the award of

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compensation. There is no indication any where, either in S. 151 or 152, to suggest that a severance of relationship was in the contemplation of the legislature. It seems to me that the defendants must continue to hold the land and the building thereon as tenants subject to the payment of the rent originally agreed upon. The damage to which they have rendered themselves liable is not for the value of the right which the landlords have in the holding, but for the wrongful act which the tenants have committed on the property. In this view it is necessary that the award of compensation should be revised. The District Judge and the Revenue Divisional Officer have assessed the amount on the ground that the landlord will lose all his rights in the property. The Lower Appellate Court must be asked to assess the damage in the light of the above observations. The finding will be returned in six weeks and seven days will be allowed for objections.

Napier, J.

Napier, J.—These are two second appeals by the parties in Appeal No. 236 of 1912 in the District Court of Tinnevelly. Summary Suit No. 120 of 1911 in the Court of the Deputy Collector of Koilpatti Division was by the Dharmakarthas of the Koilpatti temple under S. 151 of the Madras Estates Land Act asking for the ejectment of the defendants, the pattadars No. 223 of the suit lands. The Appellate Court reversing the decree of the First Court directed the defendants to pay the sum of Rs. 1,210, and in default of such payment to be ejected. In second appeal No. 2523 of 1913 the defendants 3, 4 and 5, claim that no decree should be passed against them as they had with the consent of the landholder divided their lands and had not constructed any building or otherwise materially impaired the value of their portion of the holding for agricultural purposes. That contention is founded on Section 145, but the sub-section provides that no landholder should be bound to recognise the sub-division of any irrigated field into plots less than 5 acres in extent. It is urged that the landholder had given his consent, but no issue was taken on this point and the point was evidently not urged in the Lower Appellate Court. Both courts have found that the holding as a whole has been materially impaired for agricultural purposes and rendered substantially unfit for such purposes and we cannot interfere with that finding in second appeal.

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The court has not thought it necessary to order the buildings to be removed though that was considered the proper remedy in *Ramanadhan* v. *Zemindar of Ramnad* [1] the leading case before the act and in *Orr* v. *Mrithyun'aya Gurukkal* [2] which followed it but has granted compensation.

The amount of compensation fixed by the first court was 10 per cent. of the market value of the land covered by the buildings objected to by the landholders and the question of the propriety of this assessment can only be raised in connection with the point taken by the landholders appellants in Second Appeal No. 290 of 1914. The important point in that appeal is their claim that the decree should declare that the relation of landholders and ryots still subsists and that the ryots are still liable to pay the rent due on the patta The defendants claim *contra* that the tenure has ceased. This is a very important question which is raised now for the first time in this court. It is in my opinion somewhat unfortunate that the act does not differentiate between such alternations of the character of the holding as to improve the value of the land but make it unfit for agricultural purposes, and such variations as lower the value of the land for all purposes. The act gives for the first time a right to sue to eject for such acts, it having been held in the cases above referred to that such acts do not create a forfeiture and the legislature might well have made some special provision for acts that really improve the value of the land. An injunction results in a waste of money while ejectment leaves the position as it stood before. We have however to construe the section as it stands and decide what is the effect of awarding compensation and flowing from that what is the basis of compensation. At first sight it seems incongruous that a plot which cannot be cultivated should continue to be held on an agricultural lease but I am satisfied that it is contemplated by the act. S. 151 of the Estates Land Act presumes that the landholder will institute a suit in ejectment. It provides that he may also ask for compensation in addition to ejectment. In such a case obviously the land would retain its character and on ejectment the landholder would secure another ryot, with or without compensation from the old ryot. An alternative right is given to the landholder to sue for an injunction with or without compensation. In such a case the ryot

1. (1898) I. L. R. 16 M. 407=3 M. L. J. 185. 2. (1900) I. L. R. 24 M. 65

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would be restrained from continuing the injury to the land but would remain a tenant, with or without having to pay compensation. In the third case the landlord can sue for the repair of the damage or waste. In such a case a mandatory injunction would go to the tenant compelling him to make such necessary improvements in the land as would restore it to its former value and there would remain still the relation of landlord and tenant. So far for S. 151.

We now come to S. 152 of the Estates Land Act. "If in any suit under the preceding section," that is, a suit in ejectment or for an injunction or for repair of damage, "an occupancy ryot is found liable to ejectment," but it appears that it is not necessary to eject the tenant, the court might make a certain order. The object of the section is not to leave it to the will of the landholder to exact whatever remedy he wishes but to provide that whatever the relief the landholder asks for, the court shall have a discretion to give such relief as it thinks fit, that is to say, specifically reserves to the court the powers which existed prior to the act. So the section provides that where it appears that the "damage to the holding admits of being repaired or that pecuniary compensation would afford adequate relief the decree shall provide that if within a certain period the ryot does not repair the damage or pay the sum fixed by the Collector for compensation he shall be ejected" and this is the order made in this case. Assuming therefore that whatever the relief sought for by the landlord might be, the court has declined to decree ejectment, it can make a conditional order for ejectment giving the ryot a short time to do one of two things, either to repair the damage or pay compensation. If he does not take advantage of the time given to him he is ejected and the landholder procures a new ryot and the relation of landholder and ryot continues. If he does repair the damage it is equally clear that the land is restored to its proper condition, the ryot remains in his holding and the relation continues.

We now come to the last case, namely, where a ryot takes advantage of the conditional order, and within the time given by the Collector pays compensation. It seems to me impossible to construe these words as making an exception to the results arrived at in the other cases and involving the destruction of the existing relation. If it had been intended to produce a different result it

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would have been so provided in the act and that not having been done I can only construe the words in conformity with the previous conclusions. The ryot must continue to hold the land but pay compensation for the injury to the holding. A difficulty arises however to the measure of the damages. This was noted in *Ramanadhan* v. *Zamindar of Ramnad* [1] where it was pointed out that there was no definite standard by which prospective injury could be measured. In cases where the fitness of the land for cultivation has been let down, the damages are easily estimated and must be such sum of money as would enable the landholder to restore it to its former condition, that is, to do what the ryot might himself have done "to repair the damage," it would cover such expenses as renewing water channels, removing weed or sand or other deleterious matter. But in cases like the present where the land has in fact become more valuable, though less fit for agricultural purposes, it is certainly difficult to fix compensation. It is impossible to say that no compensation should be given because such a construction would permit ryots to convert agricultural land into town plots taking the whole increased value to themselves and depriving the landholder of his share in what is known in English law as 'betterment'. Where ryoti land is taken by the State under the powers of land acquisition the landholder is entitled to his share of the premium paid for the compulsory purchase. Where the landholder seeks to avail himself of the provisions of S. 186 of the Estates Land Act and acquire the holding, the ryot is entitled to full compensation, and it seems to me to follow that the ryot cannot claim to improve the value of the land for his own benefit without paying any compensation to the landholder. Further in certain circumstances a landholder is entitled to sue for enhancement. Such circumstances are set out in S. 30 of the Estates Land Act. They include improvement of the land by agencies outside the landholder or the ryot, and the improvement of the land effected by the landholder. Now clearly the conversion of an agricultural land into building land deprives the landholder of his right to effect an improvement himself and of his right to share in the result of other improvements not made by the ryot and this was also pointed out in *Ramanadhan* v. *Zamindar of Ramnad* [1]. It is difficult to value the loss of these prospective rights which must vary considerably with the location

1. (1892) I. L. R. 16. M. 407.

of the land, but an attempt must be made to do so. Compensation fixed as has been done in this case by awarding 10 per cent. of the improvements to the landholder is to my mind not ascertained in the proper manner. I would call for a finding from the Lower Appellate Court as to the amount of compensation due to the landholders on the basis of the foregoing observations.

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Napier, J.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Ayling and Mr. Justice Tyabji.

Sankar Rangayya and another. *Petitioners* in Crl. P. C. No. 3 of 1915 (1st and 2nd accused in Crl. Case Nos. 77 and 84 of 1914 on the file of the Court of the Joint Magistrate of Bezwada)*

v.

Sankar Ramayya and another. *Petitioners in Crl. P. C. No. 28 of 1915 accused 1 and 2 in Crl. Case Nos. 118 and 119 of 1914 on the file of the Court of Joint Magistrate of Bezwada).*

Sankar Rangayya v. Sankar Ramayya

Criminal Procedure Code, Ss. 345, 423. 1 (d), 439,—Compounding of offence in revision before the High Court—Power of the High Court—Indian Penal Code, S. 325.

An offence cannot be allowed to be compounded when the matter is pending before the High Court in revision.

S. 345 of the Criminal Procedure Code, is exhaustive of the circumstances and conditions under which composition can be effected.

Emperor v. *Ram Pyari* [1], Not followed.

Petitions under S. 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the convictions of, and sentences passed upon, the accused in calender case Nos. 77 and 84 of 1914 and 118 and 119 of 1914 on the file of the Court of the Joint Magistrate of Bezwada and Crl. Mis. Petitions filed by all the petitioners in the above two Crl. Revision Petitions for sanction to give effect to the compromise petitions entered into by both parties.

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* Cr. R. C. Nos. 3 and 28 of 1915. Cr. R. P. Nos. 1 and 24 of 1915, and Cr. Misc. P. Nos. 186 and 187 of 1915. 9th August 1915.

1. (1909) I. L. R. 32 A. p. 158.

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T. Ramachandra Row, Vakil for petitioners in Crl. R. C. No. 3 of 1913.

Ganti Venkataramiah, Vakil for petitioners in Crl. R. C. No. 28 of 1915.

Ag. Public Prosecutor (*Nugent Grant*) on behalf of Government.

The Court made the following

Tyabji, J.

Order :—*Tyabji, J.*—The first point involved in this revision case is whether the desire of the parties to compound the offence of causing grievous hurt punishable under S. 325 of the Indian Penal Code can affect our decision. The point arises in a case where two brothers brought a charge and counter-charge against each other for causing grievous hurt and rioting and each of them was sentenced by the Joint Magistrate to one month's rigorous imprisonment.

From these sentences they could not appeal but they have applied in revision and are now desirous of compounding.

The composition of offences is dealt with in S. 345 of the Criminal Procedure Code.

Sub-Section (1) specifies the offences which may be compounded without leave of Court by the injured person. It contains no reference to the stage at which the proceedings may lie.

Sub-Section (2) provides that the offence of causing grievous hurt may, with the permission of the Court before which any prosecution for such offence is pending, be compounded by the person to whom the hurt has been caused.

Sub-Sections (3) and (4) extend the sphere of composition by permitting it: (*a*) in the cases of abetments of and attempts to commit the offences that may be compounded, and (*b*) by permitting guardians of minors, etc., to compound.

Sub-Section (5) refers to cases where a person has been committed to trial or where he has been convicted and he has appealed, in either of which cases it is provided that no composition for the offence shall be allowed without the leave of the Court concerned.

Sub-Section (6) gives to a composition the effect of an acquittal.

Sub-S. (7) disallows composition except as provided by the section.

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The section therefore contains provisions with regard to (*a*) the persons who may compound (*b*) the nature of the offences that may be compounded; (*c*) the stage of the criminal proceedings at which composition is sought to be made; (*d*) it also provides that in regard to some offences the mere consent of the injured person shall not suffice for composition: he must obtain the permission of the court, the courts being specified whose permission to compound has to be obtained.

Sub-S. (7) must therefore be taken to mean that no offence shall be compounded except where the provisions of S. 345 are satisfied as to each of these four matters.

The section mentions the court before which the prosecution is pending to which the accused is committed for trial and before which an appeal is pending. There is no reference to the High Court in its revisional powers. Conversely it is noteworthy that S. 439 (which defines the powers and functions of the High Court in revision) does not refer to S. 345.

It would therefore seem that if an offence were allowed to be compounded when the matter is pending before the High Court in revision, it could not be said that the composition was as provided by S. 345 in two respects (1) as to the stage of the proceedings (2) as to the Court which, it is provided by the section, must give leave. It follows that the offence cannot now be compounded.

It was argued before us that we are empowered (sitting in revision) to allow the composition to be made by reason of S. 423 (1) (d) read with S. 439 (1). For this argument it is contended that the giving of leave to compound is merely a consequential or incidental order a contention that was accepted in *Emperor* v. *Ram Pujari* [1], but rejected in *R.* v. *Ramachandra* [2]. Knox, J., who decided the latter case sitting alone was a party to the earlier decision also but his attention was not drawn to it and he does not notice it.

In connection with this argument I observe that the code in no place specifically empowers any court to give permission to compound; nowhere is there any special provision conferring distinct powers to sanction compositions. In S. 345, (2), the permission of the court is referred to as a condition precedent to

1. (1909) I. L. R. 32 A. 153. 2. (1914) I. L. R. 37 A. 127.

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the act of the parties having any effect; and in S. 345 (5) the absence of such permission is mentioned as depriving the composition of any effect; but in each case it is assumed that the court has power to give permission, provided there is any occasion for granting permission.

The point of view from which the sub-sections are drafted is, however, that it is the injured person who has to be empowered to compromise and the difficulty in the way of compromise in revision is in my opinion not so much that the revision court has not been specifically authorised to grant permission, but that the parties are not allowed to compound except at the stages when the prosecution is pending, or the accused has been committed for trial, or an appeal is being heard from a conviction. The absence of any power being given to the injured person to compromise when matters are before the revision court is fatal by reason of S. 345 (7).

In my opinion therefore the offence cannot be compounded at the present stage.

Ayling, J.

Ayling, J.—I have had the advantage of perusing the judgment of my learned brother, and concur in the conclusion at which he has arrived on the preliminary question for our decision.

In my opinion Section 345, Criminal Procedure Code, is exhaustive of the circumstances and conditions under which composition can be effected. No other meaning can be given to clause (7). With great respect to the learned Judges who decided *Emperor* v. *Ram Pujari* [1] I cannot see how an order permitting composition can be treated as an "incidental order" within the meaning of clause (d) of Section 423, Criminal Procedure Code and I do not think that section confers on an appellate court any powers relating to composition independent of S. 345.

Ayling and Tyabji, JJ.—Dealing with the revision petitions on their merits we see no reason to interfere with the convictions. As regards sentences, the Public Prosecutor represents that in view of the family nature of the quarrel and the other circumstances of the case, it is not necessary to send the petitioners (who are now on bail) back to prison. We are disposed to take the same view, and we reduce the sentences in each case to the terms of imprisonment already undergone by the petitioners. The bail bonds are discharged.

1. (1909) I. L. R. 32 A. 153.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Mr. Justice Spencer and Mr. Justice Kumaraswami Sastri.

Hakeem Patte Muhamad ... *Appellant* * (*Plaintiff*)

v.

Shaik Davood ... *Respondent* (*3rd Defendant*).

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Transfer of Property Act S. 98—Anomalous mortgage—Possessory mortgage with a condition that property should become the mortgagee's on default as 'on a sale'—Terms enforceable—Clog on the equity of redemption.

A document, described as "Swadina Tanaka Meddatu Sharatu Pattiram" (possessory mortgage containing a condition for a period fixed) recited that the mortgagors had received Rs. 10 and mortgaged their house, site, etc., that they undertook to pay the principal and interest within a year and take back possession of their house, site, etc., and that if they failed to act according to the said conditions, they would surrender the house and land treating the transaction as a sale. The document was dated 20-3-1894. In a suit for redemption brought in 1912,

Held; that the mortgage was an anomalous mortgage within the meaning of S. 98 of the Transfer of Property Act and the plaintiff had no right to redeem after the prescribed period.

S. 98 of the Transfer of Property Act is not controlled by S. 60.

Second Appeal against the decree of the District Court of Kistna at Masulipatam in A. S. No. 109 of 1913 preferred against the decree of the Court of the District Munsif of Bezwada in O. S. No. 210 of 1912.

The Second Appeal arose out of a suit for redemption of a mortgage dated 20-3-1894. The Courts below dismissed the suit on the grounds that the mortgage was an anomalous mortgage, that at the end of the period of one year fixed by the mortgage-deed (Exhibit I) the mortgagee, the 3rd defendant in the suit, became owner and had, at the date of suit, acquired a title by adverse possession, and that therefore there was no right of redemption. The case depended entirely upon the construction of the mortgage deed, Exhibit I, which was called "ముద్దతుషరతు ఖనభాపత్రం" ("*Swadina Tanaka Meddatu Sharatu Pattiram*") and the material portion of which was as follows:—

"Within these limits a house site together with a thatched house therein, we have mortgaged, that is, we have kept it as a possessory mortgage and have received Rs. 10 from you. So having paid the principal and interest pertaining to these ten rupees within the end of a year from the said date, we shall take possession of our house and site. If we do not act according to the said condition we shall quit the said land and house as if this is a sale. Thus is the possessory mortgage deed with a period fixed executed with full consent."

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* S. A. 2828 of 1913. 10th August, 1915.

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P. Nagabhushanam for appellant. The Lower Appellate Court proceeds on the footing that the law allows a mortgagor and a mortgagee to stipulate by the mortgage deed itself for the extinguishment of the right to redeem in a certain event. My submission is that such a stipulation is a clog on the equity of redemption and is invalid. See *Samuel* v. *Jarrah Timber and Wood Paving Corporation* [1], *Kanhayalal* v. *Narhar* [2], *Neelakandhan* v. *Anantakrishnan Iyer* [3].

[*V. Ramadoss* for the respondent referred to *Usmaan Khan* v. *Dusanva* [4], as being a case exactly in point.]

That case is distinguishable on the ground that it proceeded on the footing of the subsequent conduct of the parties. It did not hold against the position I am now contending for. Even if it is held to do so, my submission is that it is not in conformity with accepted law. See also *Perayya* v. *Venkata* [5], where it is pointed out that the act of parties contemplated by the Proviso to S. 60 of the Transfer of Property Act is act subsequent to the mortgage transaction and not an act which is part of the same. *Srinivasa Iyengar* v. *Radhakrishna Pillai* [6]. There was a covenant for payment in the present case and the Courts below were therefore wrong in considering the effect of the clause in question to be to convert the mortgagee into an absolute owner at the end of the period fixed.

[*Spencer, J.*—If the mortgage is an anomalous mortgage, what is the result to you ?]

Under S. 98 of the Transfer of Property Act the condition must be given effect to. The mortgage is either usufructuary with a clog on the equity of redemption or a combination of a usufructuary and a simple mortgage. Under S. 76 cl. (*b*) of the Transfer of Property Act the mortgagee will have to account to the mortgagor for the profits.

[*Kumaraswami Sastri, J.*—No interest is provided for in this case. The provision in the deed is "We shall pay.........and redeem." Does that amount to a covenant to pay ?

1. (1904) A. C. 323.
2. (1903) I.L.R. 27 B. 297.
3. (1907) I.L.R. 30 M. 61 at 66.
4. I.L.R. 37 M. 515, s.c. 23 M. L. J. 360.
5. (1888) I.L.R. 11 M. 403.
6. (1913) 26 M.L.J. 47.

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Yes; even if it does not, the transaction will be a usufructuary mortgage with a clog. S. 62 of the Transfer of Property Act defines the rights of a mortgagee in possession. Even if the mortgagee in the present case cannot get a personal decree, he can get a decree for possession at the end of the term fixed.

[*Spencer, J.*—Supposing the mortgage in the present case is a combination of a usufructuary mortgage and a mortgage by conditional sale, will it be governed by the Transfer of Property Act?]

Yes, because it will not be an anomalous mortgage within the meaning of S. 98. The covenant to appropriate the usufruct for interest need not be express and may be implied—See Gour's Transfer of Property Act Vol. 2 p. 686, para. 1049. The mortgaged property in this case being a house in the occupation of the mortgagee, an agreement may be implied that he is to appropriate the rent payable by him to the interest payable by the mortgagor. When there is a term fixed for payment, although the provision may not operate as a covenant to pay, yet it will enable the mortgagor to ask for possession. *Kola Venkatanarayana* v. *Veeppala Ratnam* [1] was a case of a "Mudhata Krayam" and the transaction was treated as a mortgage by conditional sale.

V. Ramdoss for Respondent. The mortgage in this case does not come within any one of the mortgages defined by S. 58 of the Transfer of Property Act; neither is it a combination of two or more of such mortgages. It is an anomalous mortgage and the stipulation alleged to operate as a clog is valid S. 98 of the Act is not controlled by S. 60.

Visvalinga Pillai v. *Palaniappa Chetty* [2] *Srinivasa Iyengar* v. *Radhakrishna Pillai* [3], *Amarchand Kilamorar* [4].

[*Per Sadasivaiyar, J.*—A mortgage in which there is no sale at the outset is not a mortgage by conditional sale. *Srinivasa Iyengar* v. *Radhakrishna Pillai* [3].]

[*Spencer, J.*—Is there any other authority for that position?]

Yes, *Buchiraju* v. *Ramalinga Murthi* [5] which is referred to in *Kola Venkatanarayana* v. *Veeppala Ratnam* [1]. The deed in the present case fixed a period for payment and cannot therefore be held to be usufructuary, Gour Vol. 2 p. 686.

[*Kumaraswamy, Sastri J.*—In the present case the deed does not say that possession is given for a fixed term. It entitles

1. (1906) I. L. R 29 M. 531. 2. (1897) I. L. R. 21 M. 1.
3. (1913) 26 M. L. J. 47 at 53. 4. (1903) I. L. R. 27 B. 600 at 603.
5. (1878) 14 M. L. J. 337=I. L R. 27 M. 526.

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the mortgagee to possession for an unlimited term, though the mortgagor is allowed to redeem at the end of one year.

The mortgage, if redeemable at all, is redeemable at the end of one year only. The deed says it is a mudhatakrayam for one year.

[*Kumaraswamy Sastri, J.*—Assuming that the mortgage is anomalous and that the rule against a clog is a rule of general jurisprudence, why should we not apply it to such a mortgage ?

This question is referred to and considered in *Srinivasa Iyengar* v. *Radhakrishna Pillai* [1]. Even if according to English law, the rule against clog is there applicable to anomalous mortgages, it is made inapplicable to them in India by the Act. The rule of English Law " Once a mortgage always a mortgage " was not part of the Common Law of India *P. A. Pattabhiramaier* v. *Venkatarama Naidu* [2], *Thambuswamy Mudali* v. *Hossain Rowther* [3] *Gopalan Naidu* v. *Kunhan Menon* [4].

[*Kumaraswamy Sastri, J.*—The Privy Council seem to hold that after the year 1858, the English doctrine of "Equity of Redemption" would apply to India.]

The decisions between 1858 and 1882 are not of any use because the Privy Council in *Thambuswamy Mudali* v. *Hossain Rowther* [3], said that the view taken in them was wrong but ought not to be disturbed because to do so would disturb titles created on the faith of such decisions.

[*Kumaraswamy Sastri, J.*—But if a stipulation having the effect of clogging the equity of redemption was relieved against between 1858 and 1882, what change was effected by the Act and why should we not do so also ?

The stipulation such as the one in question is not opposed to public policy.

In determining the nature of a particular mortgage the conditions of the definition in S. 58 of the Act must be strictly adhered to, *Narayana Iyer* v. *Venkatarama Iyer* [5]. With regard to the question whether, after the event specified, the mortgagee's possession did not become adverse to the mortgagor, the case is governed by the decisions in *Usmani Khan* v. *Dasanna* [6].

P. Nagabhushanam replied.

1. (1913) 26 M. L. J. 47 at 53.
2. (1870) 13 M.I.A. 560 at 571.
3. (1903) I.L.R. 1 M. 1 P.C. at 15, 18, 21.
4. (1907) I.L.R. 30 M. 300 at 303.
5. (1902) I. L. R. 25 M. 220.
6. (1912) I.L.R. 37 M. 545, s. c. 2 S. M.L.J. 360.

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The Court delivered the following

Judgments :—*Spencer*, *J.*—A vendee from the original mortgagors brought this suit for redemption. The suit document is termed *swadina, tanaka meddatu sharatu pattiram* which may be translated as a possessory mortgage deed containing a condition for a period fixed. It recites that the mortgagors have received Rs. 10/—and have mortgaged their house site with a thatched house standing thereon, that they undertake to pay the principal and interest on these Rs. 10/—within a year and take back possession of their house and site, and that, if they do not act according to these conditions, they will surrender the house and land treating the transaction as a sale.

This suit for redemption was brought seventeen years after the term expired. The District Munsif dismissed the suit on the ground that the 3rd defendant had adverse possession for over twelve years, following *Usmani Khan* v. *Dasanna* [1]. The facts of that case were somewhat different. The parties agreed to treat the possession of the mortgagee as the possession of a full owner after possession had been enjoyed for eight years under the mortgage, and nine years after the execution of the deed they showed by their actions that they wished to act upon that agreement. It is, of course, always open to a mortgagor and a mortgagee to enter upon a fresh transaction independent of the mortgage extinguishing the mortgage and passing the property of the mortgagee as a purchaser. (*See Kanhayalal* v. *Narhar*) [2]. But here we are concerned only with the terms of the document. The District Judge has treated it as an anomalous mortgage, in which case under S. 98 of the T. P. Act the rights and liabilities of the parties have to be determined strictly by their contract. The appellant's vakil maintains that it is a usufructuary mortgage or a combination of a usufructuary and a simple mortgage with a clog on the equity of redemption, and he quotes *Srinivasa Iyengar* v. *Radhakrishna Pillai* [3] in support of his argument.

I am of opinion that the District Judge was right. Simple mortgages, mortgages by conditional sale and usufructuary mortgages are defined in S. 58 of the Transfer of Property Act. This cannot be treated as a simple mortgage as there is delivery of the property to the mortgagee, as there is no personal covenant of the mortgagor to pay, and as there is no provision that the mort-

1. (1912) I.L.R. 37 M. 545, s. c. 23 M. L. J. 360.
2. (1903) I. L. R. 27 B. 297. 3. (1913) 26 M. L. J. 47.

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gagee may sell the property and apply the proceeds in payment of the mortgage money; nor is it a mortgage by conditional sale as there is no ostensible sale; nor is it a usufructuary mortgage as there is no condition that the mortgagee should receive the rents and profits and appropriate them in lieu of interest. In fact, the document does not provide any rate of interest. Moreover, the possession of the mortgagee is not to continue until payment of the mortgage-money, but for a fixed period of one year after which the transaction is to become a sale. In *Visvalinga Pillai* v. *Palaniappa Chetty* [1] a mortgage for a fixed period was treated as an anomalous mortgage.

It is argued that, if the document be treated as a combination of two forms of mortgage, such, for instance, as a simple mortgage and a usufructuary mortgage combined, all the distinguishing features, such as possession by the mortgagee, necessarily cannot be retained; but, at least, we may expect to find such features present as are not contradictory to the features of the other kind of mortgage with which it is combined. But that is not the case here. Taking the document to be an anomalous mortgage the parties must by the provisions of S. 98, be strictly bound by the terms of their contract, and neither the conditions of S. 60 as to the survival of the rights of redemption, nor the English principles of equity can be applied (Vide *Gopala Nair* v. *Kunhan Menon* [2]).

A number of other decisions have been cited in which by applying the principles of English Equity the right of redemption has been held to subsist even after the document declares it to have ceased. Such are the decisions in *Thumbuswamy Moodali* v. *Hossain Rowthen* [3], *Ramaswami Sastrigal* v. *Sainiyappa Naiyakan* [4] and *Kola Venkatanarayana* v. *Vuppla Ratnam* [5] in which the document was described as 'meddatu Krayam' and contained terms similar to those in the document before us.

These decisions relate to documents executed before the year 1882, when the Transfer of Property Act was introduced and settled the law on the subject of mortgages. Between 1858 and 1882 the Courts of this Presidency and of Bombay applied doctrines which the English courts of Equity applied to mortgages in England; but in dealing with documents executed since 1882 the courts are bound to apply the provisions of the Transfer of

1. (1897) I. L. R. 21 M. 1.
2. (1907) I.L.R. 30 M. 300 at 305.
3. (1875) I. L. R. 1 M. 1.
4. (1881) I. L. R. 4 M. 179.
5. (1906) I. L. R. 29 M. 531.

Property Act. (See *Neelakandhan* v. *Anantakrishna Iyer* [1] and *Ramayya* v. *Guruva* [2]. The second appeal must be dismissed with costs.

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Kumaraswami Sastri, J.

Kumaraswami Sastri, J.—The plaintiff is the appellant. He sued to redeem a mortgage dated 20th March 1894. The material portion of the document runs as follows: "within these limits a house site together with a thatched house thereon we have mortgaged, that is, we have kept it as a possessory mortgage and have received Rs. 10 from you. So having paid the principal and interest pertaining to these ten rupees within the end of a year from the said date we shall take possession of our house and site. If we do not act according to the said condition we shall quit the land and house as if this is a sale." The deed purports to be a *Muddetusharatu Tanekha.*

Both the lower Courts dismissed the suit on the ground that the suit was barred as the mortgagee became the owner and was in possession as owner of the property from 1895 and that there was consequently no mortgage to redeem. It is argued by Mr. Nagabhushanam that the rule of law "once a mortgage always a mortgage" applied to the present case and that it was not competent to the parties to contract themselves out of the rule by a stipulation which is invalid as a clog on the equity of redemption.

Reference has been made to S. 60 of the Transfer of Property Act and to *Samuel* v. *Jarrah Timber and Wood Paving Corporation* [3], *Perraya* v. *Venkayya* [4], *Ramaswami Sastri* v. *Samiappa Naicken* [5], *Kola Venkatnarayana* v. *Kuppala Ratnam* [6], *Srinivasa Iyengar* v. *Radakrishna Pillai* [7], *Neelakantam* v. *Anantakrishna Iyer* [8], *Bapuji Appaji* v. *Senavoray Marwadi* [9].

Whatever doubts may exist when the position of mortgagee was converted into that of a purchaser by a distinct subsequent contract between the parties, the decisions referred to above show that a clause covenanting for an absolute title in default of redemption within the stipulated period in a deed of mortgage falling within any of the kinds of mortgages defined in S. 58 of the Transfer of Property Act or a combination thereof referred

1. (1906) I. L. R. 30 M. 61. at p 66.
2. (1890) I. L. R. 14. M. 232.
3. (1904) A. C. P. 326.
4. (1888) I. L. R 11 M. 403.
5. (1881) I. L. R. 4 M. 179.
6. (1906) I L. R. 29 M. 531.
7. (1913) 26 M. L. J. 47.
8. (1906) I. L. R. 30 M. 61.
9. (1877) I. L. R. 2 B. 234.

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to in S. 98 is governed by S. 60 of the Transfer of Property Act, is invalid and does not prevent the mortgagee from redeeming.

The following observations of Justices Muthusawmi Aiyar and Shephard in *Parayya* v. *Venkata* [1] are clear and in point. "According to this argument the stipulation in the mortgage instrument that if the money is not paid within the date fixed the instrument shall itself be considered as an absolute sale deed coupled with the fact of failure to pay within the time fixed, must be deemed to be an act of the parties extinguishing the right of redemption. In our Judgment this is not a tenable position and the 'act of parties' a phrase used here and elsewhere in the act in contradistinction to "Operation of law" must denote a release or such other transaction standing apart from the mortgage transaction under which the right of redemption comes into existence. There is no extinguishment of the right by act of parties where by virtue of a stipulation contained in the very contract under which the right is created, that right ceases to exist.

Reference has been made by Mr. Ramadoss for the Respondent in *Usman Khan* v. *Dasamma* [2] first reported in 1912 M. W. N. 995 and referred to by the Lower Appellate Court and it is argued that possession by the mortgagee for 12 years after the date referred to in the deed of mortgage confers on him title as purchaser. It appears from the facts reported that there was a separate release deed for a fresh consideration. Their Lordships Sundara Ayyar and Sadasiva Ayyar, JJ. were of opinion that though the release deed owing to want of registration would not confer immediate ownership yet it operates or changes the character of possession of mortgagee into possession of owner. There is nothing in the judgment to indicate that their Lordships were overruling the decision in *Perayya* v. *Venkata* [1] or laying down the rule that a recital in the mortgage-deed itself would alter the nature of the possession.

I am of opinion that if the mortgage in question can be brought under any of the classes defined in S. 58 of the T. P. Act or can be said to be a combination referred to in S. 98 of the Transfer of Property Act, the clause in the deed of mortgage to the effect that it shall operate as a sale is invalid as being a clog in the equity of redemption and that the plaintiff's right to redeem is not affected.

1. (1888) I.L.R. 11 M. 404.
2. (1912) I. L. R. 37 M. 546, s.c. 28 M. L. J. 360.

The next question is whether the mortgage in question can fall under any of the above classes.

It has been argued by Mr. Nagabhushanam for the appellant that the mortgage is one by conditional sale or at least a combination of a simple and usufructuary mortgage and reference has been made to *Kola Venkatanarayana* v. *Vappula Ratnam* 1 and to *Sreenivasa Iyengar* v. *Radakrishna Pillai* 2. Meddatu Krayam has been defined by Wilson in his glossary as "land mortgaged with the option to the lender to consider it as his property if the mortgage is not redeemed within a stipulated period" and the words Meddatu Sharatu Tanakha in the suit documents mean the same thing. In *Kola Venkatanarayana* v. *Vappula Ratnam* 2 above referred to, the terms of the document were similar to those of the suit bond.

Their Lordships the Chief Justice and Mr. Justice Benson held that there was a mortgage by conditional sale though the document was executed before the Transfer of Property Act came into force. Their Lordships were inclined to the view that the instrument in question which provided for the payment of the sum due within a fixed date and in default constituted the mortgagee owner fell within the definition of a mortgage by conditional sale in S. 58 of the Transfer of Property Act. If the definition given in S. 58 is strictly applied it is doubtful whether a transaction which at its inception is a deed of mortgage with possession and which is to ripen into a sale on the happening of a certain contingency can be said to be a mortgage whereby the mortgagor ostensibly sells the property with a covenant for redemption or reconveyance if the mortgage money is paid. In *Sreenivasa Iyengar* v. *Radakrishna Pillai* 2, Sadasiva Aiyar, J. was of opinion that such a mortgage was not a mortgage with a clause providing for future conditional sale. Though the 29 Madras case was referred to during the course of the argument, it has not been referred to and distinguished. Spencer, J. was not disposed to place a strict interpretation on Section 58 (c) and refers to cases where mortgages like those in question are described as mortgages by conditional sale.

All the cases where mortgages like the present were treated as mortgages by conditional sale were cases of mortgages created before the passing of the Transfer of Property Act. I agree with

1. (1906) I. L. R. 29 M 531 2. (1913) 26 M. L. J. 47.

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Sadasiva Ayyar, J. in thinking that a mortgage like the present one is not a mortgage by conditional sale. It also does not fall within the definition of either a simple or usufructuary mortgage. It is not a simple mortgage as possession has been given and there is no covenant or a right given to the mortgagee to bring the property to sale, nor is it a usufructuary mortgage as there is no provision for the appropriation of the rents and profits towards the principal or interest due and possession as mortgagor is to be only for a year. I do not think that the mortgage can be said to be a combination when the *essential* ingredients of each of the classes is wanting at least when such elements do not contradict each other and so can find place in the document.

I am of opinion that the mortgage falls within the provision of S. 98 of the T. P. Act. It has been argued that the principles of equity which form the basis of a series of decisions between 1858 and the date of the passing of the Transfer of Property Act whereby any agreement entered into at the time of the mortgage having the effect of clogging the right of redemption was declared inoperative should be applied to anomalous mortgages even though S. 98 of the Act enacts that in cases of anomalous mortgages the rights and liabilities of the parties shall be determined by their contract as evidenced by the mortgage-deed. It is contended that the court ought not to enforce illegal or invalid stipulations.

I do not see any sound reason for departing from the language of S. 98 and importing an exception not mentioned therein. As pointed out by their Lordships of the Privy Council in *Pattabiramier* v. *Venkata Rao* [1], mortgages like the mortgage in question were long common in India and were recognised and enforced according to their letter both by Hindu and Muhamadan Jurists and that what is known in English law as the equity of redemption was unknown to the ancient law of India. In *Thambuswami* v. *Hussain Rowthen* [2] their Lordships of the Privy Council observe that the decision in *Pattabiramier* v. *Venkata Rao* [1] was based on sound principles and that the course of decisions which imported into the consideration of Hindu mortgages principles founded on the maxim, once a mortgage always a mortgage, of the English court of equity were radically unsound and involved very mischievous consequences.

1. (1870) 13 M. I. A. 560; 2. (1875) I. L. R. 1 M. 1.

Hakeem Patte Muhamad v. Shaik Davood.

Kumaraswami Sastri, J.

It is thus clear that there is nothing opposed to the Hindu law or to the general principles of equity, or good conscience in giving effect to the terms of the contract and it seems to me that the legislature in enacting S. 93 included to take such mortgages as did not fall within the classes specified therein out of the rule which their Lordships of the Privy Council thought was erroneously imported into Hindu mortgages. *Neelakundan* v. *Anantha Krishna Aiyar* [1], and *Ramaya* v. *Guruva* [2], support the view that the terms of the contract ought to be strictly enforced in cases of anomalous mortgages.

I would dismiss the appeal with costs.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Spencer and Mr. Justice Coutts-Trotter.

Rajah Damara Kumara Thimmayinim Bahadur Varu, Rajah of Kalahasti ... *Appellant* * (*Plaintiff*)

v.

Swarnam Kamakshamma and others ... *Respondents* (*Defendant.*)

Rajah of Kalahasti v. Kamakshamma.

Civil Procedure Code V of 1908, S. 11 Explanation II—Applicability to suits instituted prior to enactment of—Res judicata, law of, not a rule of procedure—Law applicable to suit is law in force at time of its institution—Agraharam—Grant subject to payment of meras and russums—conditional upon continuance of purposes thereof—Right to enforce payments on failure of purposes.

Where, in a suit instituted before the enactment of the Code of Civil Procedure 1908, a decision in a suit of 1902, which would not have operated as a bar under S. 13 of the Code of 1882, was pleaded as a bar on the strength of the alteration in the law made by Explanation II to S. 11 of the Code of 1908,

Held that Explanation II to S. 11 of the Code of 1908 had no retrospective operation and that the decision relied upon did not operate as a bar.

Colonial Sugar Refining Co. v. *Irving* [3] applied.

Where it was found that, though an agraharam was granted subject to the payment of certain meras and russums, yet it was a condition of the grant that the payments were to continue only so long as the purposes for which they were made continued, *Held* that the payments could not be enforced after the purposes failed.

Devanai v. *Raghunatha Rao* [4] applied.

Second Appeal against the Decree of the Court of the Subordinate Judge, North Arcot, in Appeal Suit No. 37 of 1911 (Appeal No. 336 of 1907 on the file of the District Court of North Arcot) preferred against the decree of the Court of the District Munsif of Tirupati in Original Suit No. 393 of 1905.

* S. A. 494 of 1912. 26th July 1915.

1. (1907) I. L. R. 30 M. 61.
2. (1891) I. L. R. 14 M. 232.
3. (1905) A. C. 372.
4. (1913) 13 M. L. T. 351.

Rajah of Kalahasti v. Kamakshamma.

The suit was by the plaintiff, the Raja of Kalahasti, for the recovery of Rs. 513-6-7 being the principal and interest of alleged arrears of *jodi* and road-cess due for faslis 1312 to 1314 on the Parlapalle Agraharam attached to Alathurpolliem in the Kalahasti estate. The defendants were the Agraharamdars. What was claimed as *jodi* was really made up of certain meras and russums.

The defendants contended *inter alia* that jodi as jodi was never paid, that the meras and russums claimed were voluntary payments and the plaintiff was not entitled to insist upon the payments being continued, and that, as the purposes for which some of the payments were made ceased to exist, the payments could no longer be enforced. With reference to these defences, the plaintiff urged that the matter was *res judicata* between the parties by reason of the decision in a previous suit O. S. 787 of 1902. That was a suit brought by the plaintiff for the alleged jodi and road-cess for faslis 1309 to 1311 claiming them at the same rate as that claimed in the present suit, and it was decreed in full in spite of the defence of the agraharamdars.

Exhibit I, the earliest document produced in the case, being of the year 1803, showed the details of the various russums and meras that were being paid previously by the agraharamdars and that those were all then converted into fixed cash payments at the request of the agraharamdars. The courts below therefore found that the grant of the agraharam was subject to the payment of the various meras and russums referred to in Exhibit I. The District Munsif allowed the plaintiff's claim in respect of some items and disallowed the rest, some on the ground that the purpose for which they were made ceased to exist, and the others on the ground that the impositions were unauthorised and illegal. The Subordinate Judge on appeal allowed another item also.

With regard to the plea of *res judicata* the courts below held that the decision in O. S. No. 787 of 1902 did not operate as a bar. They held that the rule of *res judicata* was a rule affecting substantive rights and not a mere rule of procedure, that, the suit having been instituted before the enactment of the code of 1908, the question fell to be decided under the old code, and that as no second appeal lay against the decision in O. S. No. 787 of 1902, it could not bar the present suit in which a second appeal did lie.

Avanasi Gounden v. *Nachammal* [1] was relied upon in support of the last position. Against the decree of the Lower Appellate Court, the plaintiff preferred the above second appeal. Rajah of Kalahasti v. Kamakshamma.

L. A. Govindaraghava Aiyar for Appellant.

A. Krishnaswami Aiyar for Respondent.

The Court delivered the following

Judgment:—This appeal arises out of the assertion on the part of the Zemindar of Kalahasti of a claim to levy certain meras and russums which the respondent agraharamdars have denied their liability to pay, as being in their view unauthorized exactions.

The first argument is that the matter is *res judicata* between the parties by reason of the decision in a previous suit of 1902.

But it is clear that in 1905 when this suit was instituted that decision according to the then prevailing law, which was settled by the Full Bench decision in *Avanasi Gounden* v. *Nachammal* [1], being one in which no second appeal lay, could not operate as a bar to a fresh decision on the same point in a subsequent suit between the parties.

After the decision in that suit the law was altered by the introduction of the Civil Procedure Code of 1908, in which the Explanation II to S. 11 of that code provided for the first time that the competence of a Court should be determined without reference to the existence of a right of appeal from its decisions.

It was held by the Privy Council in *Colonial Sugar Refining Company* v. *Irving* [2] that a right to appeal to a superior tribunal is a substantive right which belongs to a suitor, and the well known principle was further affirmed that an act which takes away a substantive right is not retrospective in effect except by express enactment or by necessary intendment.

The second objection is that the payment of the *meras* and *russums* referred to in Ex. I was part of the consideration for the grant of that part of the landlord's melvaram which went to make up the agraharam. The Subordinate Judge found, as we understand his judgment, that the grant was subject to those payments but he also held that it was a condition of the grant that they were to continue only so long as the purposes for which they were made continued.

1. (1906) I.L.R. 29 M. 195. 2. (1905) A. C. 372.

Rajah of Kalahasti v. Kamakshamma.

The case is thus on a similar footing to that decided in *Devanai* v. *Raghunatha Rao* [1] where it was held that as between a Zemindar and his tenants a fee payable for a particular purpose could no longer be enforced when that purpose failed. An attempt has been made to distinguish that case on the ground that these agraharamdars have not shown that they possess occupancy rights and that their position is thus inferior to that of the tenants in the above decision. But there is no presumption or proof that the agraharamdars are liable to be ejected from their holdings, and *prima facie* they appear to be in a stronger position than ordinary ryots, considering the nature and length of their tenure. Under Regulation 25 of 1802 the Zemindar in the absence of a contract to the contrary, is not entitled to collect more than the fixed quit-rent or jodi in case of pre-settlement inams. The parties have not raised the question that this grant was subsequent to the settlement and the earliest document between them is one of the year 1803, which by its terms purports to be subsequent to the original grant.

The questions as to which of the charges relate to purposes which have ceased to exist are questions of fact into which we cannot enter.

This Second Appeal is dismissed with costs.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Mr. Justice Tyabji and Mr. Justice Phillips.

Sri Rajah Inuganti Kasturamma Bahadur Zemindarini. *Appellant.** *(Defendant)*

v.

Chelikani Venkatasurayya Garu ... *Respondent (Plaintiff).*

Kasturamma v. Venkatasurayya Garu.

Contract Act—S. 2 (d)—Consideration—Contract—Agreement based on past consideration when amounts to contract—Right of suit—Stranger to contract—Right to sue for benefit conferred by contract—Rule—Exception—Right of suit—When cestui qui trust—*Circumstances determining existence of trust.*

The mere fact that at the desire of the promisor the promisee has done something prior to an agreement is not sufficient to make the subsequent agreement a contract.

Whether or not the agreement will be held to be a contract depends upon whether or not the promisee intended to impose upon himself a legally enforceable liability.

The circumstance that the promisee has left to himself the option of revoking the promise at his mere will, or of otherwise putting an end to the duration of the promise will in itself negative any intention on the part of the promisee to impose upon himself a legal liability.

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* S. A. No. 1587 of 1913. 28th August 1915

1. (1913) 13 M. L. T. 351.

Kasturamma v. Venkatasurayya Garu.

Circumstances to be considered in determining whether the promisee intended to impose upon himself a legal liability

Stewart v. *Basey* [1] referred to.

When A contracts with B to pay money to C, C cannot merely on the basis of such a contract sue A.

In re *Empress Engineering Co.* [2] referred to.

In order to enable C to sue as a *cestui qui trust* the contract must be intended to secure a benefit to him.

Gandy v. *Gandy* [3] referred to.

The plaintiff sued the defendant, the widow of the Zemindar of Kirlampudi, for the recovery of the arrears of salary agreed to be given to him by the Zemindar. The grounds of the defendant's liability were stated in the plaint to be that, in consideration of great services rendered by the plaintiff and his father to the Zemindar, the latter agreed to give to the plaintiff a salary of Rs 20 a month during the plaintiffs' lifetime and that in the deed of mortgage with possession executed by the Zemindar in favour of the defendant there was a stipulation that the defendant should pay the allowances to the plaintiff. *Held* that plaintiff could not recover on the strength of the direction to pay contained in the mortgage deed, unless the defendant could be held to have been constituted a trustee for the plaintiff.

Circumstances from which a trust could be inferred considered.

Second Appeal against the decree of the Court of the Temporary Subordinate Judge of Rajahmundry in Appeal Suit No. 129 of 1912, preferred against the decree of the Court of the District Munsif of Peddapur in Original Suit No. 211 of 1909.

This Second Appeal came on for hearing on Thursday the 26th day of November 1914.

Srinivasa Iyengar and K. Bhashyam for the Appellants.

Peri Narayana Murthi and *Ganti Venkataramayya* for the Respondents.

The Court (*Oldfield and Tyabji, JJ.*) delivered the following

Judgment:—The plaint is to the effect (1) that the plaintiff and his father rendered great services to the defendant's husband, the late Zemindar of Kirlampudi; (2) that in consideration of such services the late Zemindar agreed to give to the plaintiff a salary of Rs. 20 per mensem during the plaintiff's lifetime; (3) that "accordingly the defendant's husband gave possession of his estate to the defendant and executed a deed of mortgage with possession" (*viz.*, Exhibit B on the record) "and asked the defendant to pay the allowances payable to the plaintiff." There

1. (1892) 1 Ch. 104, 105. 2. (1880) 16 Ch. D. 125.
3. (1884) 30 Ch. D. 69, 70, 74.

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is a reference to natural love and affection, but there is no registered document between the plaintiff and the Zemindar and S. 25 (1) of the Indian Contract Act has not been relied upon. The prayer is that a decree be passed for recovery of the arrears of the alleged allowances after July 1907 from the estate of the late Zemindar (who died on 2nd November 1906) in the hands of the defendant.

The written statement denies both (1) the alleged consideration and (2) generally the agreement to pay during the plaintiff's life-time; and raises the contentions (3) that Exhibit B is "indefinite and cannot be legally enforced" and that (4) its terms were controlled by a letter Exhibit I alleged to be written by the late Zemindar to the defendant, which made the alleged salary payable only during the plaintiff's good behaviour. This last contention need not be dealt with any further as Exhibit I has been held to be spurious. It is admitted that the defendant is the heir of the deceased Zemindar, and it is not denied that she has assets from his estate out of which the plaintiff's claim may be satisfied.

Two entirely distinct cases are alluded to in the plaint and issues, which have to be considered separately, though in our opinion they ultimately depend on a determination of the same facts.

One case open to the plaintiff is that there was an unconditional and irrevocable contract between the Zemindar and himself for payment to him of Rs. 20 per month so long as he lived; that as the Zemindar predeceased the plaintiff, part of the contract has to be performed after the death of the promisor; that that part would be enforceable against the defendant as the legal representative of the promisor under S. 37 of the Indian Contract Act illustration (a) and S. 40, illustration (a); and that the fact that the consideration had already been executed prior to the contract would not affect its enforceability.

The finding of the Lower Appellate Court that there was a contract to the effect mentioned on which the plaintiff may sue cannot however be accepted, as (1) Exhibit B has been referred to even for this aspect of the case not merely as evidence of the contract between the Zemindar and the plaintiff, but as if Exhibit B were itself the contract on which the plaintiff could sue though he is not a party to it; (2) the defendant's position as the legal representative of the Zemindar and as a party to Exhibit B have

been confused ; and (3) no attention has been paid to the question whether the promise by the Zemindar was intended to be irrevocable or to be subject to any condition of good behaviour on the part of the plaintiff, or revocable at the mere will of the promisor. This last question is distinct from the defence based on Exhibit I which was that as a matter of fact the promise had been revoked or validly altered.

The question whether or not the promise by the Zemindar was revocable is of great importance to the question whether the promise amounts to a contract and requires detailed examination.

The only consideration alleged for the contract is past services. The plaintiff could not therefore have insisted on the performance of the contract by threatening not to perform his own part of the alleged contract, as there was nothing for the plaintiff to perform. In such a case the promisee cannot by any act of his own oblige the promisor to fulfil his promise; nor can there be any legal obligation to do anything, unless a liability to perform the promise (not depending on the mere will of the promisor) it is imposed by the promisor upon himself by his agreement, and unless such liability is made to rest upon the acts already done by the promisee.

The mere fact that at the desire of the promisor the the promisee has already done something prior to any agreement (Indian Contract Act S. 2 (d)) cannot be sufficient to make any subsequent agreement a contract. It would not amount to a contract if it was no more than a promise to make a gift at the mere will of the promisor. Transfer of Property Act Ss. 124, 126. Whether the Zemindar intended to impose a legally enforceable liability upon himself, or whether he merely promised to make a series of gifts, has not been considered by the Lower Appellate Court. It is clear that if the Zemindar left to himself the option of revoking the promise, at his mere will, or of otherwise putting an end to the duration of the promise, that in itself would negative any intention of imposing upon himself a legal liability (which would necessarily be independent of his own will); such a revocable promise could not therefore be called a contract at all.

In order to determine whether or not, the Zemindar intended to impose upon himself a legal liability, the Lower Appellate

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Court ought to have considered (1) the nature of the services rendered by the plaintiff to the Zemindar (2) whether at the time that the Zemindar made the promise upon which the plaintiff relies, there was any outstanding liability on the part of the Zemindar to remunerate the plaintiff or (3) whether the services were of a nature for which no compensation was expected or (4) which had already been fully compensated for. If there was an outstanding liability then as pointed out by Bowen, L. J , in *In re Casey's Patents Stewart* v. *Casey*[1] the subsequent promise may be almost conclusive evidence of the value that the parties intended to put upon the liability. On the other hand there might have been no outstanding liability either because the remuneration which was legally due to the plaintiff had already been paid, prior to the promise, or because apart from an express promise to remunerate, the plaintiff did not expect any remuneration. Whether there was any expectation of remuneration would depend (amongst other things) upon the nature of the service. The effect of S. 2 (d) of the Indian Contract Act upon each of these distinct state of circumstances might be different. Where acts have been done in the past which might or might not (at the opinion of a party) support a contract, it has to be determined whether the party did as a matter of fact desire to place his liability on that foundation. There must be not only the intention to create a liability, but that intention must be given effect to by reference to consideration though the consideration may be already executed.

None of these matters have been adverted to by the Lower Appellate Court, nor are there findings on them from which any legal inference may be drawn either in favour of or against the plaintiff on the question whether the Zemindar intended to enter into an enforceable contract in consideration of past services or whether the past services of the plaintiff were only a motive for promise, the performance of which was intended to depend on the mere will of the Zemindar.

The second aspect of the case depends upon Exhibit B as its foundation.

In this aspect the plaintiff can succeed only if Exhibit B was such a transaction with reference to the plaintiff as to bring him within any exception to the rule which prevents a person who is not privy to a contract from enforcing it—for Exhibit B was a

1. (1892) 1 Ch. 104, 115.

mortgage between the defendant and her husband, and the plaintiff is not a party to the document. The exceptions to that rule have been considered in *Iswaran Pillai* v. *Taragan* [1]. For the present purpose it may be stated that this aspect of the plaintiff's case depends upon whether or not Exhibit B—or rather clause 31 thereof on which the plaintiff relies, "though in form it is a contract to which the plaintiff was not a party was intended to secure a benefit to the plaintiff, so that the plaintiff is entitled to say that he has a beneficial right as *cestui qui trust* under that contract." See per Cotton and Bowen, L. JJ, in *Gandy* v. *Gandy* [2]. To this aspect of the plaintiff's case the existence or non-existence of any prior contract—binding the Zemindar, would be only indirectly relevant: The prior contract would merely indicate the history or the motive for the creation of the trust (assuming that a trust was created) by Exhibit B. The liability of the defendants would in this aspect arise (if at all) as a party to Exhibit B and her character as legal representative of the Zemindar would not be material.

The direction in Exhibit B to pay to the plaintiff is not enough to create a trust in his favour. When A simply contracts with B to pay money to C, C cannot merely on the basis of such a contract sue A. *In re Empress Engineering Co.* [3]. In order to enable C to sue, the contract must (as we have already said) be intended to secure benefit to the plaintiff so that the plaintiff is entitled to say that he has a beneficial right as *cestui qui trust*. The circumstances which have to be considered in order to determine whether the contract is intended so to secure a benefit cannot of course be categorically and exhaustively laid down. But the following four considerations may be referred to, see *Wall* v. *Bright* [4], *Shaw* v. *Foster* [5], and the cases cited in *Iswaran Pillai* v. *Taragan* [6]. It must be determined (1) Whether the defendant was made a trustee for the plaintiff by Exhibit B or whether her position was merely such that she might become a trustee if certain events were to take place which were contemplated in Exhibit B, (2) if she was made or had become a trustee, had she any personal and substantial interest in the property (*viz.*, as wife and presumptive heir of the Zemindar or as mortgagee) which she had a right to protect, or did the

1. (1914) 26 M. L. J. 127.
2. (1884) 30 Ch. D. 57, 69—70, 70—71.
3. (1880) 16 Ch. D. 125.
4. (1820) 1 Jac 494.
5. (1872) 5 H. L. 321.
6. (1914) 26 M. L. J. 127.

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contract override any interest of her own in the property; in other words (3) was any specific property charged with the payment to the plaintiff in which the defendant was to have no beneficial interest whatever; (4) was Exhibit B communicated to the plaintiff, and did he accept it in lieu of any rights that he had prior to Exhibit B.

The defendant's position as the mortgagee and as the wife and presumptive heir of the Zemindar might have important bearing on the question involved in the consideration above referred to: Assuming that she agreed to become a trustee for the plaintiff, did she agree to do so in derogation of her own present and presumptive interest in the property, or merely in so far as her rights as mortgagee and heir were not affected. For if the Zemindar made the defendant trustee of so much of the property as would produce an income of Rs. 20 per month, and the trust was to subsist after the death of the Zemindar, the defendant would not become absolutely entitled to that property until after the death of the plaintiff. Was that the intention of the parties? Was it intended by the Zemindar and agreed by the defendant that the trust was to subsist only so long as the Zemindar (and after him his representative) did not revoke the directions in Exhibit B, or was that payment to continue independently of the Zemindar's will? Hence the real question in this aspect of the case also is whether the Zemindar intended (at the time when Exhibit B was executed) to create a liability binding upon himself and the defendant in her dual capacity of a mortgagee and the Zemindar's representative or whether it was a mere revocable promise without any legal obligation. This question cannot be conclusively decided by reference to clause 31 of Exhibit B which is consistent with either view.

What is important, however, is that the plaintiff in order to rely upon Exhibit B has to establish not only the same facts which he would have to establish for succeeding on the first aspect of his case, but if he wishes to rely upon Exhibit B as giving him a distinct cause of action, he would also have to establish in effect that the defendant consented to become a party to the Zemindar's contract with the plaintiff.

This becomes clearer by referring to the facts. The plaintiff claims on a twofold basis that the Zemindar (1) agreed to pay (2) made what may be called a trust for payment. The

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trust is not explicit, and in order to determine whether the clause in question did create a trust, it has to be determined amongst other things whether it was meant that the Zemindar himself and his legal representative were to have no control over the property alleged to be impressed with the trust, or whether any option was reserved to the Zemindar and his legal representative of not acting upon the clause, and thus liberating the property in question from the trust: in other words did the Zemindar intend to place on himself and his legal representative an irrevocable liability to pay or did he not. S. 78 of the Indian Trusts Act is not alleged to be applicable and clauses (*b*) and (*c*) need not be considered.

It was argued before us for the defendant that the plaintiff's right to receive the payment as against the defendant would be coterminous with the existence of the mortgage created by Exhibit B and that as the defendant became owner of the properties mortgaged, the mortgage must be taken to have merged. S. 101 of the Transfer of Property Act. The argument is curiously inverted from the shape it took in *Gokuldas Gopaldas* v. *Puranmal Premsukh Das* [1], (and the shape it would ordinarily take) inasmuch as it is the mortgagee who asserts that the mortgage is merged and a third party who denies the merger. The question however whether the mortgage subsists or not except in so far as that question is involved in those that we have already referred to, does not affect the rights of the plaintiff, for the plaintiff can sue the defendant only if and in so far as she is either a representative of the Zemindar or a trustee on behalf of himself: It may be that the mortgage has merged and yet the trust (if it was ever created) would subsist; on the other hand, if the direction to pay did not create a trust then the subsistence of the mortgage would not create it. If it be the fact, as the plaintiff claims, that there was a trust created in his favour by Exhibit B then the property impressed with the trust would go out of the private property of the Zemindar and be held by the defendant not as the mortgaged property, nor as the Zemindar's property after his death, but as trust property: to such property consequently the defendant would not become "absolutely entitled" (See Transfer of Property Act S. 101) on the Zemindar's death, and no question of merger would arise. If there was no

1. (1884) I. L. R. 10 C. 1035.

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trust created it is an academic question so far as the plaintiff is concerned whether the mortgage subsists or is merged. The question of trust is of no other importance except to establish the plaintiff's right to the allowance; for there is no question of want of assets or of following the property in the hands of an alienee.

The Lower Appellate Court must be asked to submit a finding on the question whether the Zemindar agreed to impose upon himself a legal liability to pay the sum of Rs. 20 a month to the plaintiff. In arriving at a finding on this question the Lower Appellate Court will deal specifically with the various subsidiary questions of fact and law indicated above. The finding will be submitted in 6 weeks and 7 days will be allowed for filing objections.

[In compliance with the order contained in the above judgment, the Temporary Subordinate Judge of Rajahmundry submitted a finding to the effect that the Zemindar agreed to impose upon himself a legal liability to pay the sum of Rs. 20 a month to the plaintiff.]

The Court delivered the following

Judgment:—We accept the finding which is one purely of fact. We see no reason for thinking that the learned Subordinate Judge did not give due consideration to the various points mentioned in the judgment calling for findings. Several, though perhaps not all of the points have been alluded to by him.

The result is that the appeal is dismissed with costs.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Sadasiva Aiyar, and Mr. Justice Tyabji.

Segu Chidambaramma ... *Appellant** (*Plaintiff*)

v.

Sareddi Hussainamma and others ... *Respondents* (*Defendants Nos. 1. 2. and 4*).

Segu Chidambaramma. v. Sareddi Hussainamma.

Hindu Law Widow—Alienation—Alienation attacked as being nominal by attaching decree-holder who has obtained decree against widow for debt of her husband—Alienation for no necessity—Onus of Proof—Distinction—Attachment of reversionary interest left in Hindu widow after invalid alienation by her—Validity of.

Where a Hindu widow sold certain property of her husband and subsequently the plaintiff obtained a decree against her for a debt due by her husband, attached the said property in execution, and, on the attachment being raised at the instance

* S. A. 1495 of 1912. 1st April 1915.

of the alienee, sued for a declaration that the sale was nominal or without consideration, that it was in any event not for necessity, and that the property was liable to be attached in execution, Chidambaramma v. Sareddi Hussainamma.

held that

(1) the onus of proving that the sale was nominal or without consideration lay upon the plaintiff, while the onus of proving that it was binding on the reversion lay on the alienee,

(2) if the sale was real but was not binding on the reversion, the plaintiff was entitled to attach and to bring to sale the reversionary interest in the property remaining in the widow after such alienation.

Second Appeal against the decree of the District Court of Kurnool in Appeal Suit No. 27 of 1911 preferred against the decree of the Court of the District Munsif of Nandyal in Original Suit No. 173 of 1910.

This Second Appeal coming on for hearing on Thursday, the 16th day of July 1914.

V. C. Seshachariar for Appellant.

P. Venkataramana Rau for Respondent.

The Court delivered the following

Judgment:—The learned District Judge is justified in his view on the burden of proof to this extent, namely, that the burden of proving that the alienation by the widow (1st defendant) to the 3rd defendant was nominal or without consideration lay on the plaintiff who attached the plaint property for realising the amount decreed to him as due by 1st defendant's deceased husband. We must accept his finding that the plaintiff has not discharged that burden. But there is the further question whether the alienation by the widow was made for such a necessary purpose as would bind the property after the widow's death and whether the plaintiff is not entitled to attach and bring to sale the said reversionary estate in execution of his decree.

The burden of proving as against a creditor of the husband or as against a reversioner that an alienation by the widow is binding on the reversion is clearly on the alienee.

The learned District Judge says that "the defendants no doubt, have not satisfactorily proved the necessity for the sale" but we are loath to accept and act upon that finding as the District Munsif had come to a different conclusion and the learned District Judge's above observation appears as a sort of *obiter dictum* in his judgment.

We shall, therefore, call for a fresh finding on the evidence already on the record on the question whether the alienation by the 1st defendant to 3rd defendant in 1899 was made for purposes binding on the reversionary interest in the plaint property.

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Sadasiva Aiyar, J.

The finding should be submitted within six weeks from the date of receipt of records, and ten days are allowed for filing objections to the finding.

[In obedience to the above order the acting District Judge of Kurnool submitted a finding that the alienation was not binding.]

The Second Appeal came on for final hearing on 30th March, 1915.

V. C. Seshachariar for Appellant.

T. M. Krishnaswamy Iyer for *P. Venkatramana Rao* for Respondent.

The Court delivered the following

Judgments:—*Sadasiva Aiyar, J.*—The facts are as follows: the plaintiff is the decree-holder in O. S. No. 311 of 1901 on the file of the Nandyal District Munsif's Court. The judgment-debtor is the first defendant, a Hindu widow who represented her husband's estate fully and the decree was passed for a debt due by her husband. The plaint property was attached by the plaintiff (decree holder) as belonging to her husband's estate. The attachment was made on the 11th November 1908, but the widow (the first defendant) had sold the property in 1899 itself to the third defendant, who sold it in his turn to the second defendant in 1905. The widow's sale was not made for necessity and was invalid beyond her life-time.

On these facts the question in second appeal is whether the plaintiff, who is the appellant before us, is or is not entitled to attach and bring to sale in execution of his decree in O. S. No. 311 of 1901 that portion of the husband's estate which is left unaffected by the sale executed by the widow, that sale-deed as we said before not affecting more than that interest in the property which could enure during the widow's life-time. There are no doubt observations in several cases deprecating the description of a Hindu widow's estate as a life interest, because she fully represents the estate for most purposes and nobody else represents any interest in the estate during her life-time and she is not a trustee for anybody. (See paragraphs 624 and 625 of Mayne's Hindu law). My own opinion is that when once it is admitted that she represents the estate fully, some of the Hindu law texts which direct her not to alienate the estate except for necessary purposes are merely moral admonitions and a sale by her in contravention of those moral precepts does not fail to

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convey the absolute ownership to the purchaser. But authorities which cannot possibly be got over have held that an alienation not for legal necessity is only valid during her life-time, that is it conveys to the purchaser only a right to enjoy during the widow's life-time. (See the very recent case in *Singaram Chettiar* v. *Kalyanasundaram Pillai* [1]). When the full estate is vested in her and yet owing to the restrictions which from being moral restrictions, have become legal restrictions, she can convey only an interest to last during her life-time by a conveyance not for legal necessity, it seems to me to follow that the absolute estate vested in her becomes by her alienation for her own purposes (valid during her life-time) divided into two estates (1) a life estate enjoyable by the purchaser during her life time and (2) a reversionary estate to be enjoyed after her life-time, both, of which estates or rather the total of which belonged to her husband at his death. So far as her life interest is concerned, it became by her alienation not available to the creditors of her husband; but the ownership of the remaining reversionary estate continues in her as part of the estate which she inherited from her husband. That seems to me to be available to her husband's creditors. Mr. T. M. Krishnaswami Aiyar relied upon the cases which have held that a presumptive reversioner had no interest in the property during the widow's life time which can be attached by his creditor. (See the latest case of this Court in Appeal No. 184 of 1913). In my opinion, these decisions are irrelevant in the consideration of the question whether the widow as heir of her husband has still left in her some property belonging to her husband's estate which could be attached by her husband's creditor after she had made an alienation binding on her during her life-time. No person can claim during the widow's life-time, after the alienation of the widow's life estate, to be the owner of that reversionary interest, but it does not follow therefrom that no reversionary interest in property forming part of the husband's estate is left after her alienation of her life estate. If an interest belonging to the husband's estate is left, some legal person must be its owner. If a presumptive and contingent reversioner is not the legal person in whom the reversionary right exists, it must be the widow in whom the whole legal estate vested at her husband's death. If so the decree-holder who obtained a decree

1. (1914) M. W. N. 735.

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against her as fully representing her husband must be entitled to attach that reversionary interest remaining in her as part of her husband's estate.

S. 60. clause (m) of the Civil Procedure Code and S. 6, clause (a) of the Transfer of Property Act are also relied on by Mr. T.M. Krishnaswami Aiyar. S. 60 (m) of the Civil Procedure Code prohibits the attachment of a judgment-debtor's expectancy of succession. S. 6 (a) of the Transfer of Property Act prohibits the transfer of the chance of an heir-apparent's succession by such heir-apparent. These statutory provisions again are, in my opinion irrelevant to the consideration of the question before us because the judgment-debtor here is not the presumptive or contingent reversioner but the widow representing her husband's estate fully, and the transfer which would be made by the attachment and court sale of the reversionary interest is not made by any contingent reversioner or of the rights of the contingent reversioner in execution of a decree against him but by court acting upon the judgment-debtor's rights and upon the husband's estate vested in the judgment-debtor (widow).

I would therefore answer the question which I put to myself in the beginning of the Judgment in the affirmative, and setting aside the Judgments of the lower courts give a declaration to the plaintiff that the attachment made by him in execution of the decree in O. S. No. 311 of 1901 is valid in respect of the reversionary interest in the properties subject to the life interest of the widow. The parties will bear their respective costs throughout.

Tyabji, J.

Tyabji, J.—I agree. It seems to me that the widow was a party to the proceedings in two capacities: (1) as to a life interest in her own absolute right and (2) as to the reversion as the representative of her deceased husband's estate which is to devolve on his reversioner. She had no doubt purported to convey the property in both capacities but it has been found that in so far as she purported to alienate the property in her latter capacity she had stepped beyond her legal powers and was not competent to bind the reversioner. She was on that account brought on the record so that the reversionary interest of her husband's estate may also be bound. The authorities to the effect that the presumptive reversioner's interest is such a mere expectancy as is referred to in the Transfer of Property Act, S. 6 (a) support this view. For, if the reversionary interest in the widow's husbands'

estate is a mere expectancy so far as the reversioner is concerned the only person in whom "the legal estate" (I use that expression for brevity perhaps at the sacrifice of accuracy) can be said to be vested must be the widow.

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IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Sir John Wallis, *Kt.*, Chief Justice, and Mr. Justice Srinivasa Aiyangar.

Ramasami Chetty ... ... *Appellant* (Plaintiff)*

v.

Karuppan Chetty and others ... *Respondent (Defendants).*

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Civil Procedure Code, S. 11—Res judicata—Two suits involving the same questions—Judgment in one based on and following the judgment in the other—Appeal only against one judgment and decree—Principal and agent—Agent acting in excess of authority—Acquiescence or silence of principal—Ratification—Indian Trusts Act, S. 88—Interest of the agent adverse to that of the principal—Agent deriving advantage from his position—Purchase of immovable property outside British India by agent—Decree by a British Indian Court directing conveyance of the property to principal—Decree for mesne profits—Mandatory injunction—Civil Procedure Code, O. 21 Rr. 34, 52—Conflict of laws.

Where the matter in issue in two suits was the same and the suits were tried together on the same evidence and disposed of by the same judge, and the judgment in the one case was based on and followed the judgment in the other, though separate decrees were drawn up, an appeal against one of these decrees is not barred by *res judicata* by reason of the fact that no appeal was filed against the other decree.

Midnapore Zamindary Co. v. *Nitya Kali Dasi* 1 not followed. *Panchanada Velan* v. *Vaithinatha Sastrial* 2 followed.

In the case of an agent exceeding his authority ratification by the principal may be implied from the mere silence or acquiescence of the principal.

Ramaswami Chetti v. *Alagappa Chetti* 3 followed.

Where an agent purchased property under circumstances in which his own interests were adverse to those of his principal and thereby obtained a pecuniary advantage for himself, he should hold the advantage obtained for the benefit of the principal, under S. 88 of the Trusts Act.

An agent purchased some immovable property outside British India under circumstances in which he had to hold it for the benefit of his principal. In a suit by the principal in a Court in British India against the agent, a British Indian subject residing within the local limits of the jurisdiction of that Court, for an account of the profits of the property and for the execution of a conveyance of that property in favour of the plaintiff.

Held, the plaintiff is entitled to a decree for an account of the profits. So far as the execution of the conveyance of the property is concerned, the Courts in British India cannot avail themselves of the procedure provided in O. 21 R. 34 of the Code, if the defendant disobeyed the order. The only other way in which the British Indian Courts can grant this relief is by granting a mandatory injunction directing the agent to execute a conveyance which may be enforced by attachment

* A. No 223 of 1913. 8th September 1915.

1. (1914) 24 I. C. 243. 2. (1905) I. L. R. 29 M. 333.

3. (1914) 28 M. L. J. 199.

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under O. 21 R. 52 of the Code but in the absence of any precedent their Lordships declined to grant one in this case.

Appeal against the decree of the Court of the Subordinate Judge of Ramnad at Madura in Original Suit No. 48 of 1911.

This appeal came on for hearing on Wednesday, Thursday and Friday, the 28th, 29th and 30th days of July 1915 respectively.

A. Krishnaswami Aiyar, for Appellant.

K. V. Krishnaswami Aiyer and *K. V. Sesha Aiyengar*, for Respondent.

The Court delivered the following

Judgment :—Plaintiff's father and the 3rd defendant were doing business as money lenders in partnership at Kuala Lumpur under the name and style of S. L. V. The 1st defendant was engaged as an agent to conduct the business of the firm for three years and he executed the usual salary chit to the 3rd defendant on the 3rd of November 1903. He transacted the business of the firm as such agent till about the end of the year 1907 and came back to India in the beginning of 1908.

The 3rd defendant released his interest in the partnership to the plaintiff's father. Plaintiff's father is dead and the plaintiff is now the sole owner of the firm.

The suit is instituted to take the accounts of the agency. A preliminary decree was passed for an account and in pursuance of that decree statements of accounts were filed, and the plaintiff after the examination of the accounts charged the 1st defendant with misconduct in respect of particular loans which have since become irrecoverable and sought to recover their amount from him. The Subordinate Judge of Ramnad has disallowed the claim as to most of the items and the plaintiff appeals in respect of some of them.

The respondent has taken an objection to the hearing of the appeal on the ground that the question of the liability of the 1st defendant has been adjudicated upon by a prior decision which operates as *res judicata*. The facts necessary for the disposal of this question are these :—The 1st defendant when he was appointed an agent was given a $\frac{1}{6}$ share in the profits and losses of the firm ; but instead of his being given this share in the S. L. V. firm, a subsidiary firm of L. R. M. was started which was to have a $\frac{1}{3}$ share in the profits and losses of the transactions of the main S. L. V. firm, and in the L. R. M. firm the 1st defendant was to have a $\frac{1}{2}$ share, the plaintiff's

father and the 3rd defendant, the partners of the S. L. V. firm, being entitled to the other half. The L. R. M. firm was not to transact any independent business, but was simply to share to the extent of $\frac{1}{3}$ in the profits and losses of the transactions of the S. L. V. firm. It is obvious that though in name there was a separate firm of L. R. M. in which the 1st defendant had a $\frac{1}{2}$ share, the practical effect of the arrangement was to give the 1st defendant a $\frac{1}{6}$ share in the firm of S. L. V. The plaintiff simultaneously with the suit instituted another suit O.S. No. 10 of 1912 against the 1st defendant for the dissolution of the L. R. M. firm. As the questoin of the 1st defendant's liability was the same in both the suits, they were tried together on the same evidence and disposed of by the same Judge. The Judgment in O. S. No. 10 of 1912 is based on and follows the Judgment in O. S. No. 48 of 1911, though separate decrees were drawn up. Plaintiff has not appealed against the decree in the Original Suit No. 10 of 1912 and it is this judgment which is pleaded as a bar to the trial of this appeal. The respondent's vakil relies on a decision of the Calcutta High Court reported in *Midnapore Zemindary Co., Ltd.,* v. *Nitya Kali Dasi* [1], but we think the question has been decided by a Full Bench of this Court in *Panchanada Velan* v. *Vaithinatha Sastrial* [2]. Following that decision we overrule the plea of *res judicata* raised by the respondent.

Coming to the merits of the appeal, the items for which the plaintiff seeks to make the agent responsible may be divided into 3 classes. Class one consisting of items said to have been lent negligently to persons who were not in a position to repay them. These items are Nos. 23, 40, 56, 143 and 73 of the A Schedule. The 1st defendant has given evidence with respect to these items, and the Lower Court on a consideration of the evidence has come to the conclusion that the 1st defendant was not guilty of negligence with regard to these items. Our attention has been drawn to the evidence with respect to each of these transactions, and we agree with the Lower Court that there was no negligence on the part of the 1st defendant in making those loans. The next class consists of three items Nos. 18, 102 and 110, in respect of which the charge against the 1st defendant is that he lent these items to Tamils and Muhammadans contrary to the instructions of the principals. Loan No. 18 was made on the 23rd of April 1904, No.

1. (1914) 24 I.C. 243. 2. (1905) I.L.R. 29 M. 333 s.c. 16 M. L J. 63 (F.B.)

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102 in July 1905, and No. 110 in October 1905. The earliest letter in which there is a prohibition against lending to Tamils and Muhammadans in Exhibit E dated the 13th April 1904 written by the 3rd defendant to the 1st defendant. The 1st defendant replied on the 4th of May 1904 [Ex. E 2] and stated that he had lent to three Muhammadans prior to the receipt of the instructions in Exhibit E and said that for the future he would not lend to Tamils and Muhammadans. One of those persons to whom he had already advanced is Creditor No. 18, and so far as that item is concerned the agent has not disobeyed the instructions of the principals. With regard to the other items the respondent contends that although the principals gave instructions as to not lending to Tamils and Muhammadans, those instructions were not intended to be taken as positive prohibitions, but were merely in the nature of directions which he was to follow as far as possible. He also contends that the principals regularly received copies of the Day Books in which these transactions were entered and were asked by him to examine them and write to him if they had any objections, that the principals though they took objections to the loans made to one or two particular debtors, they took no objection to the loans made to Tamils and Muhammadans as such; in fact they have ratified these particular transactions. The Lower Court agreed with these contentions and we agree with it.

After the writing of Exhibit E 2, it appears that the 1st defendant was lending moneys to Tamils and Muhammadans and the principals became aware of it when the monthly Kurippus were sent to them; they took no objection to the loans to Tamils and Muhammadans as such, though they objected to a loan made to one Chellayya on the ground that the sum lent was too large. [Exhibit T 8 dated 2nd August 1904 and Exhibit XV dated 6th August 1904.] Correspondence went on between the 1st defendant and the 3rd defendant with regard to this particular man Chellayya. Finally in Exhibits XXI and XXXVIII, dated 18-9-1904 and 27-9-1904 respectively, written by the plaintiff's father and 3rd defendant to the 1st defendant, satisfaction was expressed as to the mode in which the 1st defendant was transacting the business of the firm. The next important letter is Exhibit E 1, dated 8th March 1915, in which the 3rd defendant asked the 1st defendant not to have dealings with Tamils and

Muhammadans in future. Even after this letter the 1st defendant had transactions with Tamils and Muhammadans which were brought to the notice of the principals when the copies of the Day Book were sent. On the 30th of July 1905 the 1st defendant wrote to the 3rd defendant protesting against the prohibition of loans to Tamils and Muhammadans and stating that he had lent to some Tamils who were well-known to him and had not incurred any loss in consequence (Exhibit XXI (a.) Exhibit F 2 was the reply in which no exception was taken to the 1st defendant's course of dealing. In Exhibit F, dated 28th of September 1905, the 1st defendant, writing to the 3rd sending copies of the Kurippu, asked him to examine them and write to him with regard to any objections he might have with reference to the transactions therein contained.

The reply was Exhibit F 1, dated 12th October 1905, and no objection was taken to the transactions now complained of. The 1st defendant in October 1905 gave a loan to debtor No. 110 and copies of the Kurippu were sent to the principals and no objection was taken to these transactions. It appears from Exhibit XXXVI, dated 7th September 1906, a letter written by the plaintiff's father to the 1st defendant, that the 3rd defendant who was till then principally supervising the business of the 1st defendant had asked the plaintiff's father to supervise the work of the 1st defendant thereafter, and the plaintiff's father asked for the balance sheet and for a list of debtors. Subsequent to that we find Exhibits H, F 5 and XXXVIII (*b*) letters from the 3rd defendant and the plaintiff's father asking the 1st defendant to close the business of the firm. On the 7th of November 1906 the plaintiff's father wrote Exhibit XXVI to the 1st defendant expressing satisfaction with the manner which the 1st defendant was conducting the business, and in Exhibits XXVII (*a*) and XXXVIII (*c*), dated 9th December 1906 and 27th February 1907, written by the 3rd defendant and the plaintiff's father respectively to the 1st defendant they expressed their entire approval of the manner in which the 1st defendant was doing the business; and on 8th May 1907, the 3rd defendant asked the 1st defendant to become a partner with him and open new accounts. The evidence above set out shows that the principals took no objection to the transactions now in question and must, we think, be taken to have ratified them. The learned pleader

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for the appellant contended that these facts are not legally sufficient to prove ratification and relied upon the decision in *De Bussche* v. *Alt* [1]. There is really no doubt or difficulty as regards the principle of law applicable to this case. In the case of an agent exceeding his authority ratification may be implied from the mere silence or acquiescence of the principal, and this principle has been adopted in *Ramaswamy Chetti* v. *Alagappa Chetti* [2].

The appellant does not press his claim to the item in D Schedule. There is only one other item which remains to be dealt with, and that relates to a purchase of lead mines by the 1st defendant. The 1st defendant had lent money to a Chinaman from whom he obtained a mortgage of certain lead mines. He obtained a decree and in execution of that decree brought the mortgaged properties to sale. As the price of lead was falling the 1st defendant was apprehensive that this property would not fetch a fair price and wrote to his principals that if there was no satisfactory bidding at the auction it would be necessary for them to purchase and hold the properties until they could find a buyer (See Exhibit XXXVII (j), dated 18-9-1907, and Exhibit XX, dated 6-11-1907). But instead of purchasing the property on behalf of the mortgagees the 1st defendant purchased it for the subsidiary L. R. M. firm, in which he had a half share. If the 1st defendant had purchased the property on behalf of the mortgagees, as he said he would, the principals would be entitled to $\frac{5}{6}$ share in the property purchased and the 1st defendant $\frac{1}{6}$. By purchasing for the L. R. M. firm the 1st defendant got half the properties. The principals claim $\frac{5}{6}$ of the properties on the ground that the 1st defendant who was bound to protect their interests purchased the property under circumstance in which his own interests were adverse to those of his principals and thereby obtained a pecuniary advantage for himself (see S. 88, Indian Trusts Act). We think this contention is sound.

It is, however, contended for the respondent that the principals have acquiesced in this purchase and have ratified the same. The principle laid down in *De Bussche* v. *Alt* [1] applies precisely to this transaction, and there is no evidence which goes to show that the principals ever intended to release the 1st defendant from his obligation to hold the property for the benefit of the principals.

1. L. R. 8 Ch. D. 286. 2. (1914) 28 M. L. J. 199.

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The respondent also argued that as the lands are situate outside British India the Ramnad Sub-Court had no jurisdiction to determine the title to or decree possession of the lands. This objection was not taken in the first Court, but we allowed the question to be argued here. The plaintiff does not want an adjudication as to the title of the lands nor does he seek to recover possession. The title is admittedly in the 1st defendant. What however the plaintiff seeks in the suit is the enforcement of a personal equity against the 1st defendant a British Indian subject residing within the jurisdiction of the Ramnad Sub-Court. In so far as he asks for an account of the profits of the property received by the 1st defendant from the properties so enjoyed by him and for payment of $\frac{5}{6}$ of such profits, we think he is entitled to a decree: but this $\frac{5}{6}$ will include the $\frac{1}{2}$ share awarded to him in O. S. No.10 of 1912. The plaintiff also wants us to direct the 1st defendant to execute a conveyance to the plaintiff of a $\frac{5}{6}$ share of the properties in question. As these properties are situate outside the jurisdiction we could not avail ourselves of the procedure provided in Order XXI, Rule 34 Civil Procedure Code if the 1st defendant disobeyed the order. The only other way in which we could grant this relief would be by granting a mandatory injunction directing the 1st defendant to execute the conveyance which could be enforced by attachment under O. 21 R. 52, Civil Procedure Code. We have not been referred to any precedent for issuing a mandatory injunction to compel the execution of a conveyance, and are not prepared to grant one, more especially in the case of lands situate out of British India.

The decree of the Lower Court in favour of the plaintiff and the 3rd defendant will be modified accordingly and the necessary accounts will be taken by the Lower Court and a final decree passed there. The parties will pay and receive proportionate costs of this appeal.

[This appeal having been posted for being spoken to]

The Court delivered the following

Judgment :—If the defendants 1 and 2 execute a conveyance to the plaintiff and the 3rd defendant of a $\frac{1}{3}$ share of the property mentioned in the schedule to the plaintiff's objection statement, they will be entitled to credit for a $\frac{1}{6}$ share of the purchase money with Nadappu interest in taking the accounts in this suit up to the date of the final decree in the Lower Court.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Mr. Justice Coutts-Trotter, and Mr. Justice Srinivasa Aiyangar.

Suppa Bhattar ... *Appellant * (7th Defendant)*

v.

Suppu Sokkaya Bhattar and others — *Respondents (Plaintiff and Defendants 1 to 6, 8 to 10, legal representatives of the 11th defendant and defendants 12 to 18).*

Suppa Bhattar. v. Suppu Sokkaya Bhattar.

Judgment—Estoppel by—Rendition of in the presence of all the parties interested—Binding effect of on parties whose title is later in origin—Nullity, only ground of attack—Absolute want of jurisdiction over parties or subject matter—Religious Office—Custom of alienability—Limitation Act, Art., 24—Possession of Emoluments without performing duties—Not adverse possession within.

Where a link in the chain of a party's title consists of a decree of a court of competent jurisdiction pronounced against the only person or persons who at the time of such decree had any interest which would entitle them to resist the plaintiff's title, no person whose claim is subsequent in origin can challenge that decree, or go behind it or challenge the plaintiff's title as at that date on any ground which was determined by that decree as a necessary step in its result.

Per Srinivasa Aiyangar, J: It is open, however, to such party to show that the judgment is a nullity but the only ground on which a judgment as distinguished from a conveyance, can be declared a nullity is the want of jurisdiction in the court over the parties or the subject-matter.

A judgment rendered after trial recognising the alienation of an office in the presence of all the parties interested in questioning the same cannot be questioned by a stranger on the ground that such alienation is against public policy.

Quaere, if compromise decrees stand on a different footing *Lakshmanaswami Naidu* v. *Rangamma* 1 doubted

Obiter, The weight of authority is against the view that no custom of alienability of a religious office should be recognised.

Per Curiam, Mere possession of the properties attached to an office without performing the duties of the office is not adverse possession of the office within the meaning of Art. 124 *Kamalathammal* v. *Krishna Pillay* 2 followed.

Appeal against the decree of the Court of the Subordinate Judge of Madura in Ordinary Suit No. 88 of 1911.

The facts are sufficiently set forth in their Lordship's judgment.

A. Krishnaswami Aiyar for the Appellant.

The judgment against Kuppa Bhattar is *res inter alios* so far as my client is concerned, and I am entitled to put the plaintiff to strict proof of his title, to impugne the genuineness and the validity of the will on which the plaintiff's claim is based notwithstanding the judgment in O. S. No. 88 of 1911.

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* A. No. 280 of 1913. 20th August 1915.

1. (1902) I. L. R. 26 M. 31.
2. (1910) 20 M. L. J. 781.

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[By the Court. The judgment may not be binding on you as *res judicata* either as a judgment *inter partes* or as a judgment *in rem*. But is not the decree obtained against the only possible and rightful claimant in itself a root of title ?]

A judgment is either *res judicata* or it has no other legal effect on the rights of other parties. A judgment may be admissible under certain sections of the Indian Evidence Act, but even then it is only evidence and has no conclusive effect.

[Cf. S. 45 Indian Evidence Act.] Judgment itself may be a fact in issue or a relevant fact as in cases where A agrees to indemnify B against the consequences of a judgment which may be obtained by C against B or under S. 13 it may be evidence of an instance in which a right is asserted or denied. But under no section is a judgment against a third party a root of title.

[*Srinivasa Iyengar, J.*—But cannot the judgment have the effect of conveyance under certain circumstances ?]

A judgment cannot operate as a conveyance. For example, it has been held that even a declaratory decree does not stop the running of limitation. A judgment can operate as a conveyance only where the judicial proceedings are intended to be supplemental to complete a title created *inter partes* vide foreclosure proceedings. Again in case the former judgment is to be regarded as a conveyance by Kuppa Bhattar, it will be open to attack on the same grounds as a conveyance is. *Lakshmanaswami Naidu* v. *Rangamma* [1], decides that a decree based on a compromise alienating an office is open to attack on the same grounds as the compromise. An office is extra commercium under the Hindu Law. And the rule as to inalienability will apply as much to testamentary dispositions as to an alienation *inter vivos*. *Rajah Varma* v. *Ravi Varma* [2], *Narayana* v. *Ranga* [3], *Alagappa* v. *Sivarama Sundara* [4], *Rajaram Aiyar* v. *Ramaswami Aiyar* [5], *Rajeshwar Mullick* v. *Gopeshwar Mullick* [6], *Rajeswar Mullick* v. *Gopeshwar* [7]. A Court will not uphold a custom of alienability *Sundarambal Ammal* v. *Yoganana Gurukkal* [8], qualified or absolute as the same is opposed to public policy. Again in the case of a religious institution, it is only the custom of a particular institution that will

1. (1902) I. L. R. 26 M. 31.
2. (1876) I.L.R. 1 M. at p. 251.
3. (1891) I.L.R. 15 M. 183 2 M.L.J. 19.
4. (1895) I. L. R. 19 M. 211.
5. 24 M. L. J. 476.
6. (1907) I. L. R. 34 C. 831.
7. (1907) I. L. R. 35 C. 226.
8. (1914) 26 M. L. J. 315.

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be admissible in evidence as pointing to the intentions of the original founder of the institution. Vide *Rajah Varma* v. *Ravi Varma* [1], *Janoki Dabi* v. *Gopal Acharjia* [2], *Narayana* v. *Ranga* [3].

And if that is the effect of a custom, no founder can give directions in the instrument of foundation authorising the alienation of a religious office. The decision in *Mahamaya Debi* v. *Haridas Haldar* [4], is inconsistent with *Yoganana Gurukkal* v. *Sundarambal Ammal* [5], and ought not to be followed.

As to the judgment being a root of title, the cases in *Sreenivasa Iyangar* v. *Aryar Srinivasa Iyangar* [6], and *Ramamurthi Dhora* v. *The Secretary of State for India in Council* [7], are not good law. The passage from Bigelow relied on does not support the view taken in *Ramamurthi Dhora* v. *The Secretary of State for India in Council* [7]. It deals with judgments *in rem.*

The decision in I. L. R. 37 M. deals with a case where the judgment itself was a fact in issue or a relevant fact. The authorities in *Peari Mohan Shaha* v. *Durlavi Dassya* [8], and *Ramnad Zamindar* v. *Dorasami* [9], *Goluch Monee Debia* v. *Ram Monee Bose* [10], are directly in my favour.

In any event the plaintiff's suit is barred by limitation. Even though the defendant might have trespassed on the office during the lifetime of Tailamuthu the appropriate article of the Limitation Act is Article 124 and not Art. 141 as is assumed by the Court below. Article 141 applies only to suits for immovable property and not to suit for an office. There is no article corresponding to Article 141 protecting the rights of reversioners in the case of a hereditary office held by a Hindu widow vide *Pydigantam Jagannatha Row* v. *Rama Doss Patnaik*[11] and *Lilabati Misrain* v. *Bishan Choby*[12].

T. Narasimha Aiyengar for the Respondent.

[*T. Narasimha Aiyengar* was called upon to reply only on the question of limitation.]

1. (1876) I.L.R. 1 M. at p. 251.
2. (1882) I. L. R. 9 C. 766.
3. (1891) I.L.R. 15 M. 183.
4. (1914) I. L. R. 42 C. 455.
5. (1914) 26 M. L. J. 315.
6. (1910) I.L.R. 33 M. 483, s.c. 20 M.L.J. 516.
7. (1911) I. L. R. 36 M. 141 s. c. 24 M. L. J. 469.
8. (1914) 18 C. W. N. 904.
9. (1884) I. L. R. 7 M. 341.
10. (1869) 12 W. R. 21.
11. (1904) I. L. R. 28 M. 197.
12. (1907) 6 C. L. J. 621.

There is no evidence of any adverse possession on the part of defendants 2 to 6 and *a fortiori* on the part of the 7th defendant. Even defendants 2 and 4 were only working as gumastas under the committee pending determination of title to the office and therefore no question of adverse possession of the office can arise within the meaning of Article 124. The principle of Article 141 can be applied even to cases where the title to an office is in dispute.

In any event the right to the emoluments cannot be barred so long as the right to the office is not barred. The recent decision of the Privy Council *Jhalandas Thakers* v. *Jharula Das* [1] is conclusive on the matter. There their Lordships say that so long as the defendant is not in adverse possession of the office the withholding of the emoluments from the plaintiff is an actionable wrong and gives rise to a recurring cause of action. The decision in *Kamalathammal* v. *Krishna Pillai* [2] of Mr. Justice Krishnaswamy Aiyer is to the same effect.

A. Krishnaswami Aiyer in reply.

The 7th defendant's brother, the 6th defendant took possession of the lands both on his behalf and on behalf of the 7th defendant. He claimed a one-fourth share in the properties on behalf of himself and the 7th defendant. It is in evidence that the 6th defendant was doing the duties of the office. It must, therefore, be taken that he was doing the duties of the office both on his behalf and on behalf of the 7th defendant. Besides, there is no evidence that 6th and 7th defendants were divided. It must, therefore, be taken that they were undivided.

The Court delivered the following

Coutts-Trotter, J.

Judgments:—*Coutts-Trotter, J.*—The facts which gave rise to this appeal are as follows:—A certain Chandrasekara Bhattar was entitled to certain *manibham* lands appertaining to the office of *Alankara Miras* in a temple in Madura. He died on the 3rd May 1881. He had no children, but he left a widow called Thailamuthammal: he also had a nephew called Rajah Bhattar who succeeded him as *Alankara Mirasdar* and enjoyed the properties partly under a will alleged to have been made by Chandrasekara Bhattar before he died and partly by an agreement with Thailamuthammal. Rajah Bhattar died on the 25th

1. (1914) I. L. R. 42 C. 244. 27 M. L. J. 100. 2. (1910) 20 M. L. J. 781.

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January 1882 leaving a widow Akilandammal. Questions arose between the two widows, but they were settled by agreement, and Thailamuthammal went into possession of the lands and remained in possession till her death in 1885. Meanwhile, the plaintiff who is found by the Lower Court to be the nearest agnate of Rajah Bhattar brought a suit, Original Suit No. 15 of 1882, to establish his reversionary rights apparently considering those rights jeopardised by the arrangement between the ladies. He impleaded Akilandammal and Thailamuthammal as defendants together with Kuppa Bhattar, the present 4th defendant and Deivasikamani Bhattar the present 6th defendant as heirs of Thailamuthammal who had died during the pendency of that suit. In that suit the defendants raised the plea among other matters that the alleged will of Chandrasekara Bhattar was not genuine because without the will the chain of devolution to the plaintiff was broken on Chandrasekara's death. The suit was decided in favour of the plaintiff; and he obtained a declaration, as against the defendants he had impleaded, that he was entitled to succeed to the properties and the office on the death of Akilandammal. Akilandammal died some time in 1910, and as by this time the defendants were setting up claims to the office and its emoluments, the plaintiff brought the present proceedings against them to establish his right to the office. What happened to the office and who performed its duties during the first few years after Rajah Bhattar's death does not appear. But in August 1888 the Committee of the Devasthanam appointed the 1st and 2nd defendants to do the duties of the office (See Exhibits R and S). It is possible this was only giving sanction to an already existing arrangement. At a later date the 1st and 2nd defendants seem to have associated with themselves the 3rd and the 6th defendants in the discharge of the duties of the office.

The present suit came on for hearing in October 1912 and was decided in February 1913 in favour of the plaintiff. The 7th defendant appeals against the judgment. The plaintiff at the trial relied upon the prior judgment in Original Suit No. 15 of 1882 as debarring the defendants from reopening the question of the genuineness of the will of Chandrasekara Bhattar, and the learned Subordinate Judge so held, regarding the matter as governed by the doctrine of *res judicata.* His view was that, though the 7th defendant was not a party to the prior proceedings, yet

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as other reversioners who stood in the same right were impleaded, the fact that the 7th defendant was not a party did not prevent the judgment from being binding upon him. Whether on the supposed facts the decision would have been right may be open to question. Mr. Krishnaswami Aiyar cited a large number of cases to show that it was erroneous; but it is unnecessary to decide this matter, because on further examination in this Court it appeared clearly that the facts were not as the Lower Court supposed them to be. At the time when judgment was given in Original Suit No. 15 of 1882 Thalaimuthammal had died. The 3rd defendant in that suit, Kuppa Bhattar, the present 4th defendant, was a degree nearer the common ancestor than the present 7th defendant, and was therefore not a reversioner at all but the legal heir of Chandrasekara Bhattar; and the present 7th defendant was not even a reversioner and had no interest in the matter. The position then was this: the plaintiff had brought before the Court the legal heir of Chandrasekara Bhattar to whom it was conceded the properties had originally belonged and through whom any title to them must ultimately be traced. Those proceedings definitely determined the issue as to the rightful succession to Chandrasekara as between the present plaintiff and Chandrasekara's nearest descendant. The question is whether the present 7th defendant who at the date of that judgment had no interest in the properties and whose interest, if any, arose subsequently can be heard to challenge it. It is quite clear that the judgment is not binding on him either as a judgment *in rem* affecting status or as a determination of a matter whereto he was a party or privy. But it is contended that the judgment formed a link in the plaintiff's title and that as such it cannot be challenged by any person who has not a claim prior in origin and paramount to the claim of Chandrasekara's heir. It is strange that in a matter of this importance there should be a complete absence of English authority. The principle contended for by the plaintiff has however often been recognised in American decisions and is expounded in two text-books of authority, Black on judgments, Volume 2, Section 607, and Bigelow on Estoppel (6th Edition), pages 50 and 167. It has also been recognized by a judgment of this Court in *Ramamurthi Dhora* v. *The Secretary of State for India in Council* [1]. I guard myself from assenting to

1. (1911) I. L. R, 36 M. 141.

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all the reasoning of that judgment; in particular I think the passages cited from Littleton and Lord Coke have no bearing on the present question and refer to what now-a-days would be called judgments *in rem*. But I assent to the principle of the judgment which I take to be this; that where a link in the chain of a party's title consists of a decree of a Court of competent jurisdiction pronounced against the only person or persons who at the time of such decree had any interest which would entitle them to resist the plaintiff's title, no person whose claim is subsequent in origin can challenge that decree, or go behind it or challenge the plaintiff's title as at that date on any ground which was determined by that decree as a necessary step in its result. On this short ground I am of opinion that it is not open to the 7th defendant in these proceedings to maintain the invalidity of Chandrasekara's will either as an imperfect testamentary instrument or as alienating properties which, by law, are inalienable.

In these circumstances, the plaintiff having established what I may call his paper title, the only plea open to the defendant is that of limitation. The learned Subordinate Judge decided that the article of the Limitation Act which applied was Article 141. I will assume for the present purposes that the defendant is right in contending that the proper article to apply is Article 124 in accordance with the decision in *Pytigantam Jagannadha Row* v. *Rama Doss Patnaik* [1]. The question then arises, what kind of possession must have been enjoyed by the defendant to defeat the plaintiff's title? There is no doubt evidence to show that the 7th defendant has had possession of the lands attached to the office of *Alankara Miras* for more than the statutory period, and it is contended on his behalf that possession of the lands was sufficient without it being necessary to show that he performed the duties of the office. That view is contrary to the decision in *Jalandhur Thakur* v. *Jharula Das* [2]. It is also contrary to at least one decision of this Court, *Kamalathammal* v. *Krishna Pillai* [3]. It is enough for me to say that I respectfully agree with those decisions and hold that possession of the lands alone will not suffice. There is no evidence at all in this case that the 7th defendant ever actually performed the duties, of this

1. (1904) I.L.R. 28 M. 197. 2. (1914) I.L.R. 42 C. 244 P.C. s.c. 27 M.L.J. 100.
3. (1910) 20 M. L. J. 781,

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office. But it is said there is evidence that the 6th defendant performed those duties, and as the 6th and 7th defendants were jointly entitled to a fourth share of Chandrasekara's original office, the 6th defendant's performance of its duties must be held to have been undertaken on behalf of himself and the 7th defendant also. All that I need say as to that is that there is no evidence that the 6th defendant believed himself or stated himself to be performing the duties on behalf of anybody except himself; there is not even any evidence that the 6th and 7th defendants were undivided brothers. In the absence of such evidence it would, in my opinion, be quite wrong to defeat the right of the true owner by straining legal doctrines of presumptive representation.

In my opinion, the appeal fails and should be dismissed with costs to the first respondent to be taxed on one-eighth of the valuation of the Memorandum of Appeal, which is the share claimed by the only appellant.

I should like to add that the fact that I have referred in my judgment only to two or three of the very large number of cases cited in the arguments does not mean that I consider the citation of those cases to have been irrelevant. The fact is that the learned Subordinate Judge based his judgment on a number of untenable grounds, and it was only gradually in the course of the argument that it was possible to focus the discussion on to the two real questions.

With regard to the Memorandum of Objections filed by the 18 defendant, I see no reasonable ground for depriving him of costs on which a discretion could be judicially exercised to do so. His Memorandum is therefore allowed with costs.

Srinivasa Aiyangar, J

Srinivasa Aiyangar, J.—Though the hearing of this appeal took sometime, the questions which arise for decision are fairly simple and lie in a small compass.

Plaintiff sues to recover possession of certain lands attached to an office in the Meenakshi temple at Madura. He claims to be the office holder. The office is a hereditary one and admittedly belonged to one Chandrasekara Bhattar. Plaintiff relies on a judgment in Original Suit No. 15 of 1882 on the file of the Subordinate Court, Madura, which finally established as against Chandrasekara Bhattar's heir, the present 4th defendant, the title of the plaintiff to succeed to the office as the heir of one Rajah

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Bhattar the devisee under the will of Chandrasekara Bhattar after the death of Rajah Bhattar's widow who was then alive. The 7th defendant who is the only appellant here had admittedly no title on the date of that adjudication and all persons who could possibly be interested in the title to the office were parties to that adjudication. This judgment is relied on by the plaintiff as the final link in the chain of his title just in the same way as the plaintiff could have relied on a transfer of the property in his favour by the heir of Chandrasekara Bhattar. I have no doubt that for this purpose the judgment is relevant. As stated in Black on judgments, Vol. II, Section 604, "for establishing the fact that such a verdict has been given, or such a judgment pronounced, and all the consequences of such a judgment, the judgment itself is invariably not only admissible as the proper legal evidence, but usually conclusive to prove that fact. The mere fact that such a judgment was given can never be considered as *res inter alios acta,* neither can the legal consequences of a judgment be so considered. But with reference to any fact upon whose supposed existence the judgment is founded, the proceeding may or may not be *res inter alios,* and consequently may or may not be evidence according to circumstances, considering the nature of the facts themselves and the parties," and in another place, Vol. I, S. 4, (page 10). it is stated that "another consequence flowing from the rendition of a judgment is that it may constitute either an evidence or a source of title." Mr. Krishnaswami Aiyar, who appeared for the appellant did not seriously contest this position. He contends that inasmuch as he was not a party to the previous adjudication he is entitled now to impeach the correctness of that judgment. I think he is not entitled to do that. Just as a transfer from the heir in favour of the plaintiff would have given the plaintiff a title to the property as against the whole world, so likewise the adjudication established the title of the plaintiff to the office in question as against all the world. I assume of course that the property was Chandrasekara's and all the persons who had any claim to his properties were parties to the previous litigation. On this question the decisions of this Court in *Srinivasa Aiyangar* v. *Aryar Srinivasa Aiyangar* [1], *Ramamurti Dhora* v. *The Secretary of State for India in Council*[2] and in Second Appeal No. 574 of 1909 referred to therein are conclusive. The

1. (1906) I. L. R. 33 M. 483 at 485, s. c. 20 M. L. J. 516.
2. (1911) I. L. R. 36 M. 141, s. c. 24 M. L. J. 469.

principle is clearly stated in the judgment just now delivered, and I respectfully agree. Mr. Krishnaswami Aiyar referred us to the case of *Peari Mohan Shaha* v. *Durlavi Dassya*, [1] as being an authority against this position; but that case is clearly distinguishable inasmuch as the title claimed by Durlavi was a title paramount to the title of the parties to the previous adjudications. The cases reported in *Ramnad Zamindar* v. *Dorasami* [2] and *Goluch Monee Debia* v. *Ram. Monee Bose* [3] are also distinguishable. I am therefore of opinion that the 7th defendant is not entitled to question the correctness of the previous judgment; he would be entitled to show that the previous judgment was a nullity just as he would be entitled to show that a conveyance by the heir of Chandrasekara Bhattar in favour of the plaintiff was void; but the grounds for declaring a judgment a nullity would obviously be different from the grounds on which a conveyance would be declared void. I think the only ground on which a judgment could be declared a nullity is an absolute want of jurisdiction in the Court over the parties or the subject-matter. "Where a Court has jurisdiction it has a right to decide every question which occurs in the cause; whether its decision be correct or otherwise, its judgment until reversed, is regarded as binding in every other Court. But, if it act without authority, its judgments and orders are regarded as nullities. They are not voidable, but simply void; and form no bar to a recovery sought, even prior to a reversal in opposition to them. They constitute no justification; and all persons concerned in executing such judgments or sentences are considered in law as trespassers." *Elliott Et. Al* v. *The Lessee of Peirsol Et. Al* [4], *Malkarjun* v. *Narhari* [5]. Mr. Krishnaswami Aiyar contended that the previous judgment was void, because it established the validity of an alienation of religious office which is against public policy, and in support of his position relied on the decision in *Lakshmanaswami Naidu* v. *Rangamma* [6]. In that case the learned Judges held that a decree passed on a compromise ordering the sale of an office was void and the decree-holder was not entitled to execute the decree. The learned Judges held that the compromise decree was in no better position than an agreement of the parties, and they thought that as the agreement

1. (1914) 18 C. W. N. 954.
2. (1884) I. L. R. 7 M. 341.
3. (1869) 12 W. R. 21.
4. 7 U.S. Sup., Ct. Reports 170 Lawyer's Edn.
5. (1900) I. L. R. 25 B. 337.
6. (1902) I. L. R. 26 M. 31.

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between the parties was void, the decree passed on such a compromise was equally void. With all respect to the learned Judges, I think they have ignored the operation of the decree as a decree. For certain purposes a compromise decree may be of the same nature as the agreement on which it is founded. Whether a particular act is legal or illegal may itself be a subject of compromise and a decree passed on such a compromise would not be void even though the agreement may be illegal (See the observations of the Judicial Committee in *Great North-West Central Railway* v. *Charlebois* [1], (See also Section 331, Black on Judgments, Volume 1). It is, however, unnecessary to pursue this matter further as in this case the judgment was rendered after trial. In this view it is unnecessary to discuss the question raised by the learned vakil whether an alienation of a religious office is absolutely void and a custom of alienability should not be recognised by courts, as such a custom is against public policy. The weight of authority however seems to be against this contention (see *Mahamaya Debi* v. *Haridas Haldar* [2]).

The only other question which remains to be decided is whether the plaintiff's title to the office is extinguished by the adverse possession of the 7th defendant. Although the present suit is one for the recovery of immovable property, still if the plaintiff had no subsisting title to the office, he could not recover the properties which are the emoluments of the office. If the 7th defendant was in adverse possession of the office for over 12 years prior to the suit, plaintiff's title would have been barred notwithstanding the fact that the widow of Rajah Bhattar was alive till 1910 *Pydigantam Jagannadha Row* v. *Rama Doss Patnaik* [3], *Lilabati Misrain* v. *Bishan Chobey* [4]. The 7th defendant who claims to have acquired a title by adverse possession has to prove that he took possession of the office adversely to the plaintiff. There is some evidence that he along with the other co-shares was in enjoyment of the properties attached to the office, but that is not enough. He has to prove that he was performing the duties of the office. See *Kamalathammal* v. *Krishna Pillai* [5], *Jalandhur Thakur* v. *Jharula Das* [6]. There is no evidence that he ever performed the duties of the office. He

1. (1899) A. C 114 at 124.
2. (1914) I. L. R. 42 C. 455.
3. (1904) I. L. R., 28 M. 197.
4. (1907) 6 C. L. J. 621.
5. (1910) 20 M.L.J. 781.
6. (1914) I. L. R. 42 C. 244 s. c. 27 M. L. J. 100 (P. C.).

contends that the 6th defendant, his elder brother, did the duties of the office for himself and his brother, the 7th defendant. The 6th defendant himself who is called as a witness does not say so nor does the 7th defendant. The only basis for this contention is a statement made by the 6th defendant that in the division of the lands belonging to Chandrasekara Bhattar a fourth share was allotted jointly to him and his brother (Exhibit II). From this Mr. Krishnaswami Aiyar wants us to infer that the duties of the office were performed by the 6th defendant not only for himself but for the 7th defendant as the joint owner of a fourth share of the office of Chandrasekara Bhattar. I am wholly unable to draw any such inference. It is further doubtful whether the possession of the 6th defendant was adverse to the plaintiff (see Exhibits R and S). I therefore hold that the plaintiff's claim is not barred by limitation. I agree that the appeal must be dismissed with costs. I also agree to the order on the memorandum of objections.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Coutts-Trotter and Mr. Justice Phillips.

A. L. A. R. Arunachallam Chettiar and others. ... *Appellants* (Plaintiffs)*

v.

Lakshmana Aiyar and another ... *Respondents (Defendants).*

Limitation Act S. 14—Withdrawal by party—Not covered by.

S. 14 of the Limitation Act has no application where the previous suit was not dismissed by the tribunal before which it was instituted but was voluntarily withdrawn by the party himself on the discovery of a technical defect which would have involved a failure of the suit.

Second Appeal against the Decree of the District Court of Tinnevelly in Appeal Suit No. 273 of 1912 preferred against the Decree of the Court of the Additional District Munsif of Tinnevelly in Original Suit No. 303 of 1910.

K. Rajah Iyer for *S. Srinivasa Aiyangar* for Appellants.

E. S. Chidambaram Pillai and *S. E. Sankara Iyer* for Respondents.

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* S. A. 325 of 1914. 17th September, 1915.

Arunachallam Chettiar v. Lakshmana Aiyar.

The Court delivered the following

Judgment:—This appeal raises a question of some interest and the circumstances in which it is raised are these:—The appellant brings this suit against two persons who were at one time partners in respect of monies advanced by him to them. The only question for decision is whether the action is barred by limitation as regards the various items in the account which became due more than 3 years before the date of this suit. The courts below have held that this suit was barred in respect of these items. An ingenious argument has been adduced before us to show that that decision was wrong and the plaintiff is entitled to take the benefit of S. 14 of the Limitation Act. The circumstances in which he claims that benefit are these. He instituted a previous suit against the same parties as those in this proceeding, and as originally framed that suit included his claim now said to be barred and apparently included nothing that would have made that suit as originally launched bad for misjoinder or any other cause, but during the pendency of the proceeding he was allowed to amend the plaint and to put in another cause of action as to which it is not seriously disputed that it rendered the suit as it then stood bad for misjoinder of causes of action. Thereupon he applied to the Court in which the suit was pending for leave to amend it or withdraw it with permission to institute a fresh suit in respect of the subject matter of that action, at any rate in so far as it coincided with the claim he makes here to-day. That can be done under the provisions of Rule 1 of Order 23. Rule 1 of Order 23 says:—

1. At any time after the institution of a suit, the plaintiff may, as against all or any of the defendants, withdraw his suit or abandon part of his claim.

2. Where the Court is satisfied (*a*) that a suit must fail by reason of some formal defects or (*b*) that there are other sufficient grounds for allowing the plaintiff to institute a fresh suit for the subject matter of a suit or part of a claim, it may on such terms as it thinks fit, grant the plaintiff permission to withdraw from the suit or abandon such part of a claim with liberty to institute a fresh suit in respect of the subject matter of such suit or such part of a claim. That is what the plaintiff did in this case. Whether he abandoned the whole of his claim or such part of it

as we are concerned with in this appeal, he obtained the right to institute a fresh suit. Rule 2 of Order 23 is in these terms "In any fresh suit instituted on permission granted under the last preceding rule the plaintiff shall be bound by the law of limitation in the same manner as if the first suit had not been instituted." On the face of it that appears to be conclusive and fatal to the appellant's case; but he contends that the rule that its reference to the Law of Limitation impliedly subjects the whole matter to the provisions of the Law of Limitation then in force and that S. 14 of the Limitation Act expressly preserves his rights, S. 14 of the Limitation Act is as follows :—

"In computing the period of limitation prescribed for any suit, the time during which the plaintiff has been prosecuting with due diligence another suit whether in a court of first instance or in a Court of Appeal, against the defendant, shall be excluded, where the proceeding is founded upon the same cause of action, and is prosecuted in good faith in a court which, from defect of jurisdiction or other cause of a like nature is unable to entertain it."

It may be conceded for the purposes of this case, though it is not altogether clear, that there is no express finding against the plaintiff that he did not prosecute his suit in the other court with due diligence. The question then arises whether S. 14 preserves his rights in a case where his suit has not been dismissed by the tribunal, but has been voluntarily abandoned by himself on discovery of a technical defect which would involve a failure. The matter is not free from difficulty and it has been decided in *Varaj Lal* v. *Shomeshwar* [1] that the section in question of the Limitation Act has no application to a case of withdrawal of the suit and can only apply to cases where the failure of the suit was due to the action of the Court. The same result has been arrived at by the Calcutta High Court in *Upendranath Nag Chowdhury* v. *Surya Kantarao Chowdury* [2]. These are quite clear authorities for the position advanced by the respondent and we think they should be followed particularly, when it is seen that by so construing the section of the Limitation Act, there is the avoiding of any such result as the clashing of the two sections or the necessity for reconciling any apparent inconsistencies between them. If we treat the section of the Limitation Act as unconcerned with suits which are voluntarily abandoned or withdrawn, then there is no trouble to reconcile the sections because they do not need reconciling as they each deal with a separate subject matter. The

1. (1905) I. L. R. 29 B. 219. 2. (1913) 20 I. C. 205.

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Limitation Act deals with suits which are terminated by the action of the Court where the Civil Procedure Code deals, as the heading of the order shows, with cases where suits are withdrawn or abandoned by a voluntary act of the plaintiff. We think that the appeal fails and should be dismissed with costs.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Sadasiva Iyer and Mr. Justice Phillips.

G. Narayanaswamy Naidu Garu, Receiver of Nidadavole and Medur Estates. *Appellant* * *(Plaintiff) in both*

v.

Vennavalli Seshagiri Rao. *Respondent in L. P. A. No. 275 of 1914 (Defendant).*

Pannala Ammayya Sastrulu. *Respondent in L. P. A. No. 276 of 1914 (Defendant).*

Narayanaswamy Naidu Garu v. Seshagiri Rao.

Court Fees Act. Ss. 7 cl 5, cl. XI, (cc),—Act VI of 1905—Suit for recovery of immovable property from tenant—Value for jurisdiction purposes same as for Court fees—Madras Civil Courts Act S. 14—Suits Valuation Act 58.

Having regard to Act VI of 1905, in the case of suits for the recovery of immovable property from tenants the value for purposes of jurisdiction is the same as the value for Court fees purposes and not the value under S 7 cl. 5 of the Court Fees Act as provided by S. 14 of the Madras Civil Courts Act

Appeal under Clause 15 of the Letters Patent against the Order and Judgment of the Hon'ble Mr. Justice Ayling in C. R. P. Nos. 312 and 313 of 1913, preferred against the order of the District Court of Kistna at Masulipatam in Mis. Appeals Nos. 6 and 7 of 1912 (preferred against the order of the Court of the Subordinate Judge of Ellore in O. S. Nos. 18 and 19 of 1912).

P. Nagabhushanam for Appellant.

B. N. Sarma for Respondent.

The Court delivered the following

Judgments:—*Phillips, J.*—The appellant brought a suit for recovery of the suit lands and for rent against a tenant and valued his suit for purposes of jurisdiction according to the market value of the land in accordance with the provisions of S. 14 of the Madras Civil Courts Act (III of 1873) and S. 7 V (d) of the Court

* L. P. A. Nos. 275 and 276 of 1914. 20th September, 1915.

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Fees Act (VII of 1870). He accordingly presented the plaint before the Subordinate Judge but it was returned for presentation before the District Munsif on the ground that if valued under the provisions of S. 8 of the Suits Valuation Act—the value of the suit would be below Rs. 2,500 and the question has now come up in L. P. Appeal as to which provision of law should be applied in valuing the suit for purposes of jurisdiction.

The Court Fees Act was amended by Act VI of 1905 and a new category of suit was added to S. 7 of the Court Fees Act as Caluse XI (cc) *i.e.* for the recovery of the immovable property from a tenant. Undoubtedly the present suit comes under this category and the effect of the amendment is to remove such a suit from S. 7 cl. V to S. 7 cl. XI of the Court Fees Act. All suits falling under S. 7 (V) of the Court Fees Act are excluded from the provisions of S. 8 of Suits Valuation Act (VII of 1887) which provides that the valuation of suits for the computation of Court Fees shall be the same as for purposes of jurisdiction. The suits excluded from the provisions of S. 8 are those falling under S. 7 cl. V, VI, IX and X (d) of the Court Fees Act, and until the passing of Act VI of 1905 a suit for the recovery of immovable property from a tenant would not have been valued in accordance with S. 8 of the Suits Valuation Act, but in accordance with S. 14 of the Civil Courts Act. S. 14 has not been expressly repealed and the only question we have to determine now is whether it has been impliedly repealed by Act VI of 1905 in respect of suits under S. 7, XI, (cc). This latter Act is only an amendment of the Court Fees Act, and only incidentally affects the Suits Valuation Act by creating a new category of suits falling under S. 8 of that Act, and impliedly removing such suits from the provisions of S. 14 of the Madras Civil Courts Act. In the Suits Valuation Act it is expressly laid down in S. 6 that when rules are framed under S. 3, S. 14 of the Civil Courts Act shall be repealed. From this it is obvious that the Suits Valuation Act when passed was not intended to repeal S. 14 until a certain event happened, and that event has not happened; but by enacting Act VI of 1905 the legislature has not only amended the Court Fees Act but has incidentally withdrawn a certain class of suits, the one under consideration, from the provisions of S. 14 Civil Courts Act and added it to those falling under S. 8 of the Suits Valuation Act. Whether the Legislature intended Act VI of

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1905 to have this effect or not, it is clear that the effect has been caused, and consequently the law must be deemed to have been changed by the later enactment. The fact that the Civil Courts Act is an Act applicable only to the Presidency of Fort St. George, whereas the Amending Act applies to the whole of India does not in my opinion affect the question for the greater contains the less, and the law laid down in the Amending Act is applicable to Madras as well as to other parts of India. The ruling reported in 11 M. L. T. 155 has very little bearing on this case for it does not deal with section 7 Cl. XI (cc) and all that can be said is that some of the observations in the Judgment to a certain extent support appellants line of argument. The ruling in *Nandan Singh* v. *Debi Din* [1] is, if anything against him. I would therefore dismiss the appeal with costs.

Letters Patent Appeal No. 276 follows.

Sadasiva Aiyar J:—I concur in dismissing the appeals with costs.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Ayling and Mr. Justice Tyabji.

Muruga Chetty and others ... *Appellants* * (*Plaintiffs No. 1 to 6 and 8 to 12*).

v.

Rajaswamy and others ... *Respondents* (*Defendants Nos. 1 to 4, 6, 7, 11, 12, 15, 17, 21, 24 to 27, 5 and L.R. of the 2nd defendant*).

Muruga Chetty v. Rajaswamy.

Civil Procedure Code, O. 22 R. 9—Appeal—Ex parte order setting aside abatement—Right of legal representative of respondent to question—Limitation Act, Art. 120—Declaratory suit based on denial of title—Cause of action for—Knowledge of denial.

An exparte order in an appeal setting aside abatement is final and binding on the legal representatives of the deceased respondent, subject only to their right to apply for a review.

Tikait Ajant Singh v. *Christien* [2], *Ganeswar Singh* v. *Ganesh Das* [3]; followed.

The cause of action for a declaratory suit based on the denial of the plaintiff's title does not arise until the plaintiff has knowledge of the denial. The period of limitation for such a suit is under Art. 120 of the Limitation Act, six years from the date the plaintiff has knowledge of the denial of title—*Tirumal Rao* v. *Tungama Shettithi* [4], followed.

The fact that some of the plaintiffs had knowledge earlier will not affect the rights of the others to institute the suit though that may be a ground for the court refusing in its discretion to grant a declaratory decree.

Second Appeal against the decree of the District Court of South Arcot in Appeal Suit No. 355 of 1906 preferred against the

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* S. A. No 1045 of 1907. 5th August 1915.

1. (1914) 12 A. L. J. 938.
2. (1912) 17 C. W. N. 862.
3. (1906) I. L. R. 33 C. 1178.
4. (1914) 1 L. W. 134.

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decree of the Court of the District Munsif of Chidambaram in Original Suit No. 1014 of 1905.

This Second Appeal came on for re-hearing on Thursdays, the 11th September and 6th November 1913, after its restoration to the file of the High Court by order, dated 3rd January 1912 in C. M. P. No. 498 of 1910.

T. Rangachariar for Appellants.

T. V. Seshagiri Iyer for Respondents.

The Court delivered the following

Judgments:—*Ayling, J.*—The preliminary objection is raised that in consequence of appellants' failure to apply within 6 months of the death of the original 2nd defendant (which took place on 11th June 1911) to bring his legal representative on record, the appeal must be held to have abated as regards that party.

An application to set aside the abatement was made on 16th December 1912 and on this an order, as prayed for, was passed *ex parte* by Benson and Sundara Aiyar, JJ. on 6th February 1913.

Mr. Seshagiri Aiyar argues that this order being passed *ex parte* is not conclusive; and that he is entitled to ask us to reconsider the matter of the abatement in the light of the further affidavits since filed.

In my opinion this contention cannot be accepted and the order dated 6th February 1913 is final subject only to review. Order 22, Rule 9 (2) Civil Procedure Code does not require the issue of notice: and it cannot be said that on this account the order of a competent Bench of two judges is illegal; or that the subject matter of it can be reconsidered by a different Bench. It is open to any party who conceives himself to be injuriously affected by the order to apply for a review under Order 47: but no such application has been made in the present case, and we must therefore treat the Order as final.

This view appears to me to be strictly in accord with that taken in two of the cases quoted to us *Tikait Ajant Singh* v. *F. T. Christien* [1], and *Ganeswar Singh* v. *Ganesh Das* [2]. In the remaining case which is reported in *Tirpura Sundari Debi* v. *Dakhina Mohan Ray* [3], an *ex parte* order of a single Judge

1. (1912) 17 C. W. N. 682. 2. (1906) I. L. R. 33 C. 1178.
3. (1906) 5 C. L. J. 310.

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bringing a legal representative on record was held not to preclude the Bench before which the appeal came for disposal from considering the question of whether the application was within time and if not whether the abatement should be set aside. That case is, however, easily distinguishable. Apart from the fact that it was not an order setting aside abatement, and was passed by a single Judge, there is the important distinction that it appears to have been passed in ignorance of the fact that the application for substitution of the legal representative was made after the prescribed time and that the appeal was liable to be abated. That is to say the question which the Bench was asked to decide had not been considered before at all.

In any opinion the preliminary objection must be set aside, and the appeal disposed of on its merits.

Tyabji, J.

Tyabji, J.:—A preliminary objection is taken before us that the appeal must be taken to have abated as against the original 2nd defendant, or rather, that the setting aside of the abatement, to which I shall presently refer, was invalid, or otherwise of no effect as against the present 2nd defendant.

The 2nd defendant (Veerappa Gyana Desikaswamigal) died in June 1911. The appeal against him therefore abated in December 1911. An application was made to the High Court on behalf of the appellants for setting aside the abatement and for causing the legal representative of the deceased to be made a party to the proceedings, on the 16th of December 1912. The application was supported by an affidavit in which it was stated that the applicant did not know of the death of the 2nd defendant till October 1912. It was heard by a Bench of the High Court consisting of Benson and Sundara Aiyar, JJ. We are informed by the learned pleader for the appellants that an explanation of the delay between October 1912 and the 16th of December 1912 was asked, and that, on certain letters being read to the Court, the explanation was accepted, and on the 6th of February 1913, it was ordered "that the abatement be set aside and that the name of Annamalaiswami be entered in the record of the Second Appeal and in the register of this Court as the legal representative of Veerappa Gyana Desikaswamigal, the said deceased 2nd respondent in Second Appeal No. 1045 of 1907."

It is argued on behalf of the legal representative of the 2nd defendant that as a matter of fact there was no sufficient cause

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within the meaning of Order XXII, Rule 9, Civil Procedure Code preventing the appellant from continuing the appeal and that therefore the order setting aside the abatement was wrongly made and that we should now consider the appeal as having abated. It is said that we have power to cancel or otherwise to disregard the order setting aside the abatement because that order was made to the prejudice of the 2nd defendant in proceedings to which he was not a party. The order is said to be wrongly made, because from the affidavit filed by the appellant it is clear that there was a delay of about two months, for which it is argued that no proper explanation is forthcoming, and because, even if there was any sufficient cause preventing one of the appellants, there was none as regards the other.

Order XXII Rule 9 is imperative in this sense that, provided that "it is proved that he (the applicant) was prevented by any sufficient cause from continuing the suit" there is no option left to the Court, for it is laid down that in that event "the Court *shall* set aside the abatement." There is no appeal from an order setting aside the abatement, though there is one from refusal to do so, Order 43, Rule 1 (K); nor can we in this case assume to ourselves the powers which a Court of Appeal may have under the ruling in *Kichilappa Naicker* v. *Ramanujam Pillai* [1]. It therefore remains to consider whether we have inherent jurisdiction to reconsider the question whether the abatement should have been set aside on the 27th of February 1913. It is argued that we have this jurisdiction because the respondent's rights have been prejudiced by the order setting aside the abatement and the argument was supported by the following words which were used by the Privy Council in *Ganeswar Singh* v. *Ganesh Das* [2]. "Their Lordships entirely agree with the learned Judges of the High Court that it is an elementary principle which is binding on all persons, who exercise judicial or *quasi* judicial powers, that an order should not be made against a man's interest without there being given to him an opportunity of being heard." In that case the question was whether the plaintiff could obtain possession of certain property from the defendant and this depended upon whether an execution sale was rightly set aside by the Commissioner of Patna, and whether the absence of the purchaser at the time when the order setting it aside was made,

1. (1901) I. L. R. 25 M. 166. 2. (1905) I.L.R. 33 C. 1178, 1182.

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was sufficient to invalidate that order as against the purchaser. Their Lordships shortly after making the remark cited by me say, "But, however this may be, it seems to their Lordships that the proper remedy of the purchaser, if aggrieved by this order having been made in his absence, was to apply to the revenue authorities for a re-hearing, and that it is now too late to ask for a remand on that ground." This is in effect a restatement of the penultimate paragraph of the judgment of Trevelyan and Banerjee, JJ. whose judgment was under appeal. They are reported to have said in *Ganeswar Singh* v. *Ganesh Das* 1 :—" A similar reasoning would prevent our entertaining any objection to the Commissioner's order on the ground that he had not heard the purchaser. If the purchaser was aggrieved on this account, there is no doubt that he could have found an appropriate remedy in the procedure of the revenue court; but whether that be so or not, we cannot treat as invalid an order made by the tribunal to which the legislature has entrusted the power of making such order. We have no power to enquire into the circumstances under which the order was made or into the propriety of the order."

It is, therefore, clear that their Lordships of the Privy Council approved of the decision of the High Court that the High Court had no power to " treat as invalid an order mady by the Tribunal to which the Legislature has entrusted the power of making that order"; and this, notwithstanding that that tribunal in making the order in question, had in the opinion of the High Court "violated an elementary principle which is binding on all persons who exercise judicial or *quasi*-judicial powers."

It cannot be questioned in the case now before us that the order setting aside the abatement was made by the tribunal empowered to make it; and, even if it is permissible to us to assume, for the purposes of argument, that on the materials then before the court, the order ought not to have been made, it cannot be contended that there was any irregularity vitiating the proceedings; for it is admitted that the application under O. 22, R. 9 may be made *ex parte*, and that in the usual course it would be made *ex parte*.

There is, it is obvious, one distinction between the case just cited and the present one. In that case, the order sought to be

1. (1898) I. L. R. 25 C. 789, 795.

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set aside was that of a revenue Court. Here it is an order of the High Court in these very proceedings. But, sitting in the Court in which we do, we have no power to interfere with the order passed by Benson and Sundara Aiyar, JJ.; and there have been no proceedings for getting a review of that order. Indeed when it is considered how inapplicable any method of procedure either of review or of appeal would be for interference by us with the order in question, it seems to me to be clear that the legislature intended such an order to be final so far as this Court is concerned.

I must now refer to two decisions on which reliance was placed. The first is *Tripura Sundari* v. *Dakhina Mohan* [1]. In that case there never was any order setting aside the abatement. The legal representative of the 4th defendant Tripura, who was the appellant, applied to be put on record when six months had elapsed after the death of the deceased appellant, and was put on record without the abatement having been set aside; nor was the attention of the Judge called to the fact that the appeal had abated, when the appellant's representative was put on the record. Then at the hearing of the appeal, for the first time the question was considered whether the abatement that had taken place on the expiry of the 6 months should be set aside. The court permitted affidavits and counter-affidavits to be filed, considered them, and came to the conclusion that there was no reason why the abatement should be set aside. The case is no doubt authority for the proposition that, if after the appeal has abated the legal representative is wrongly brought on the record without the abatement being set aside, then the question whether or not the abatement should be set aside has still to be considered by the court to whose notice that fact is brought for the first time. It has no bearing as it appears to me, on the point whether we have power to set aside or disregard the setting aside of the abatement in the present case.

The other case relied upon before us is that of *Tikait Ajant* v. *F. T. Christien* [2]. That case seems to me to be distinguishable in this respect that there the question which the Subordinate Judge had to consider was one necessarily affecting the merits of the subject matter of the suit; it affected the original plaintiff because he was made a *pro forma* defendant instead of plaintiff,

1. (1906) 5 C. L. J. 310. 2. (1912) 17 C. W. N. 862.

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on the ground that he had assigned his rights to the applicant, and that the rights on the basis of which he had come to the court were no more vested in him; it affected the defendants because the scope of the suit was enlarged so as to include the rights not only of the original plaintiff but also of a stranger to the suit whose assignee the applicant claimed to be. It was admitted there that the further hearing of the suit on the merits could not proceed without those questions being determined; but the Subordinate Judge thought that a fresh suit was necessary for their determination.

In the appeal now before us the question whether the order setting aside the abatement was made rightly or wrongly will not affect the merits of the appeal in any way. The question depends merely upon whether the appellant was prevented by sufficient cause from making his application earlier. The causes preventing the appellant from making the application were quite independent of and did not affect the rights of the deceased respondent and his legal representative.

My conclusion is therefore that the order of Benson and Sundara Aiyar, JJ., setting aside the abatement was made by a court perfectly competent to do so; that we have no power to question the correctness of that decision and that without doing so we cannot now consider that the appeal has abated.

It is unnecessary in this view to consider the other points argued by Mr. Rangachariar and to determine whether the successor in office of the 2nd defendant is his legal representative within the terms of the Civil Procedure Code, S. 2 (11), and whether Article 177 or Article 181 of the Limitation Act was applicable.

I agree for these reasons that the appeal must proceed on the basis that its abatement has been set aside.

This Second Appeal came on again for hearing on Tuesday, the 11th August 1914, on the merits.

The Court delivered the following

Judgment:—This Second Appeal arises out of a suit for a declaration that the properties referred to in the plaint are trust properties, for the removal of certain buildings erected on the land and for possession of the land to the plaintiffs on behalf of the

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community to which the plaintiffs allege that they and the defendants Nos. 4 to 27 belong. The claim was resisted on several grounds which seem to have been sufficiently raised in the issues framed in the suit.

The District Munsif somewhat reluctantly recorded findings on all the issues. He felt himself constrained to do so by the state of the pleadings. The District Judge has not considered all the issues. He seems to have overlooked the fact that the suit was not one merely for ejectment as he states in the beginning of his judgment. The pleadings in the suit are by no means perfect. But it seems that the real points on which the parties were at issue were whether the property was private property or was to be held in trust for the community of the plaintiffs; and secondly, whether the rights of the community (if any) had been lost by a valid gift, or by adverse possession or by purchase in good faith for consideration without notice of the trust. As a subsidiary point it may also have had to be decided whether though the community may have the rights that they claim, they can now on the facts as stated in the plaint ask for immediate possession of the land. The subsidiary point does not affect the question whether the plaintiffs can claim the declaration above referred to. But we wish to record that the plaintiffs by their pleader had to concede at the hearing that the last sentence of paragraph 2 of the District Judge's judgment cannot be attacked by the plaintiffs. That sentence is as follows :—

"On the plaint allegations the suit for ejectment is clearly not sustainable for 1st defendant has not left Chidambaram and he is certainly not dead."

The District Judge has ultimately decided the case apparently on the sole ground that the suit is barred by limitation. He seems to have misunderstood the nature of the suit which he has treated as one for ejectment only, overlooking the other points on which the parties were really at issue. His finding on the question of limitation cannot therefore be accepted. For the purpose of his finding on the question of limitation he seems to have assumed that the community was originally the owners of the land. In that case, if persons purporting to act as trustees on behalf of the community, and allowed so to act by the community, give possession of the land to a third person, that person's possession cannot initially be adverse to the community. The ques-

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tion that has to be decided in such a case is whether the possession which was originally permissive ever became adverse and, if so, at what time and whether it continued adverse for the period required either for creating rights under S. 28 of the Indian Limitation Act or for preventing under Article 142 or Article 144 of the first schedule to that Act the rightful owner from asserting his rights by suit.

On the points which arise therefore, the District Judge has not expressed any opinion. We must consequently ask the District Judge to record findings on all the issues in the case on the evidence on record. We have felt it necessary to indicate why we consider it desirable to ask for findings but in so far as our remarks proceed on assumptions of fact we do not wish to restrict the District Judge in his consideration of the evidence. The plaintiffs will, however, be bound by the concession which their pleader was forced to make and there cannot in any case be a decree for immediate possession.

The findings should be submitted within six weeks from this date and seven days will be allowed for filing objections.

[In compliance with the order contained in the above Judgment, the District Judge of South Arcot submitted a finding on all issues in favour of the plaintiffs excepting the 10th issue in which his finding was that the suit was not maintainable as no consequential relief by a prayer for the appointment of trustees had been asked for.]

This Second Appeal came on for final hearing after the return of the finding of the Lower Appellate Court upon the issues referred by this Court for trial.

T. Rangachariar, G. Krishnaswami Iyer and *G. S. Ramachandra Iyer* for Appellants.

T. R. Ramachandra Iyer and *T. R. Krishnaswami Iyer* for Respondents.

The Court delivered the following.

Judgment:—We accept the findings. The 1st appellant states that he does not press the appeal. The 7th appellant however claims that on the findings accepted by us, there ought to be a declaration that the properties referred to in the plaint are trust properties belonging to the Vedamba Chetty community, subject to the right of the 1st defendant to be in possession thereof so long as he lives in Chidambaram.

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Mr. T. R. Ramachandra Aiyar for the 3rd defendant argues that the claim for a declaration is barred under Article 120 of the Limitation Act as it accrued at the date of the sale in 1893. The 7th plaintiff denies that he had any knowledge of this sale deed within 6 years of the date of the suit. Following *Tirumal Rao* v. *Tungamma Shettithi* [1], to which one of us was a party, we hold that the cause of action for a declaratory suit based on a denial of title does not arise until the plaintiff has knowledge of the denial. Mr. T. R. Ramachandra Aiyar argues however that some of the members of the community had knowledge at the date of the sale deed as they were parties to it. In our opinion the knowledge of some of the members cannot affect the right of the others.

It is then argued that in our discretion we ought not to make the declaration. When the majority of the co-owners are proved to have had knowledge of the denial of title it may no doubt be a reason for declining to grant a declaration in favour of one of the other co-owner who asserts that he had no knowledge. In the present case, however, it seems to us that it is necessary for the declaration to be made as otherwise the whole of this litigation will have been fruitless, though the defendant set up a false deed of gift and a collusive sale. The plaintiffs, however, claimed to be entitled to possession to which they were not entitled. We think therefore that the declaration should be given but without costs. Each party will bear his costs throughout.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Sir John Wallis, Kt. Chief Justice, and Mr. Justice Seshagiri Aiyar.

Arumugasundara Maharajah Pillai and others. ... *Appellants** (*Defendants*)

v.

K. Narasimha Iyer and others ... *Respondents* (*Plaintiffs and Defendants*).

Arumugasundara Maharajah Pillay v. Narasimha Iyer.

Transfer of Property Act S. 101—Merger—Scope of the doctrine—Purchase of the equity of redemption by mortgagee—Absence of mesne incumbrances, effect of.

A mortgaged his property to M who assigned his mortgage right to B's father in 1892. In 1897 B's father obtained a fresh mortgage from A for the amount due on the mortgage of 1892. On his father's death, B succeeded to his mortgage right. In 1899 B purchased A's equity of redemption in the mortgaged property.

* A. S. 244 of 1912. 15th April, 1915.

1. (1914) 1 L. W. 131.

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In 1905 B sold the same property to A purporting to reserve his rights under the mortgages in favour of his father Subsequently B instituted a suit on foot of the mortgages reserved in the conveyance of 1905

Held, that the mortgages had become extinguished by B's purchase of the equity of redemption and that B could not sue upon them.

Per *Wallis, C J.*:—Where there are no mesne incumbrances outstanding at the date of the purchase of the equity of redemption by the mortgagee there is merger under S. 101 of the Transfer of Property Act

Per *Seshagiri Iyer, J.*:—S. 101 of the Transfer of Property Act leaves untouched the general rule of law that when a mortgagee purchases the equity of redemption the encumbrance in his favour is extinguished. It only enacts that where there are other mortgages on the property an intention will be imputed to the mortgagee purchaser that he intended to keep alive his own mortgage as a protection against subsequent claimants. The mortgagee purchaser can use his prior mortgage only as a shield against mesne incumbrances and that also only in respect of properties covered by such incumbrances, but he cannot sue upon his mortgage.

Whiteley v. *Delaney* [1], *Bhawani Kunwar* v. *Mathuraprasad Singh* [2], *Laxman Ganesh* v. *Mathurabai* [3], *Syed Ibrahim Sahib* v. *Armugathayee* [4], referred to.

Appeal against the decree of the Court of the Subordinate Judge of Madura in O. S. No. 115 of 1910.

The facts of the case appear fully in the judgment of Seshagiri Iyer, J.

K. Srinivasa Iyengar (*Padmanabha Iyengar* with him) for the Appellants.

There was no subsisting mortgage in favour of the plaintiff at the date of his suit in 1910. In no case can a mortgagee bring a suit on his mortgage after he acquires the equity of redemption in the mortgaged properties. The purchase of the equity of redemption in 1900 by the plaintiff made him the owner both of the charge and the security. If the plaintiff had any right of suit on his mortgage after 1900, it was against himself. To allow the plaintiff to sue on his mortgage would be to allow a man to sue himself. If a mortgagee acquires the equity of redemption there is a merger of the two interests and the debt is extinguished, at any rate, as between the mortgagor and the mortgagee. In 1900, when the plaintiff purchased the equity of redemption in the suit properties, there were no outstanding incumbrances on the property. There was a complete merger of the mortgage right and the equity of redemption. There is a distinction between a case where the question arises between a person as the first mortgagee and himself as the owner of the equity of redemption, and where the question is between the first mortgagee who has

1. (1914) A. C. 132.
2. (1912) I. L. R. 40 C. 89.
3. (1913) I. L. R. 38 B. 369.
4. (1912) I. L. R. 38 M. 18.

purchased the equity of redemption and a puisne incumbrancer. In the former case there is a complete merger and there is no question of keeping alive the mortgage. In the latter case S. 101 of the T. P. Act applies and prevents a merger. The doctrine laid down in S. 101 of the T. P. Act applies only when there are outstanding incumbrances on the property. *Bhawani Koer* v. *Muthura Prasad* [1] which is relied on by the Lower Court has been overruled in *Bhawani Kunwar* v. *Maturaprasad Singh* [2]. A mortgagee cannot keep alive his mortgage either as against himself or against parties unconnected with the property in any way. *Bhawani Kunwar* v. *Mathuraprasad Singh* [2]. *Laxman Ganesh* v. *Mathurabai* [3] and *Munna Lal* v. *Munnu Lal* [4].

[*Wallis, C. J.*—What according to you is the effect of the reservation of plaintiff's mortgage in the sale deed to the first defendant.]

C. Padmanabha Iyengar. (Continued the argument):—The sale operates as a complete transfer of all the rights of the plaintiff in the suit properties. The reservation in the document comes after the signature of the executant and cannot qualify the operative part. See Norton on Deeds page 181; Halsbury Vol. 10 page 803. If there are two inconsistent clauses in a deed the former prevails. See Norton on Deeds p. 80; Halsbury Vol. 10. p. 799. Moreover the mortgage had been extinguished by operation of law in 1900 when plaintiff purchased the equity of redemption. The mere reservation of a non-existent mortgage cannot confer any right. The reservation is also invalid and unenforceable as it does not comply with the provisions of S. 54 of the Transfer of Property Act. In any case, the plaintiff's suit is not on the right reserved to him by Ex. L, but on the original mortgage.

[He then referred to the evidence in the case to show that the plaintiff had treated his mortgage as extinguished after 1903.]

C. S. Venkatachari (*A. Srinivasa Iyengar* with him) for the respondent:—There is no merger in this case. There were mortgages outstanding in the suit properties at the date of the purchase of the equity of redemption. There can be no merger

1. (1907) 7 C. L. J. 1.
2. (1912) I. L. R. 40 C. 89.
3. (1913) I. L. R. 38 B. 369.
4. (1914) I. L. R. 36 A. 327.

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in law in this case. See per Krishnaswami Iyer, J. in *Mulla Veetal Seethi* v. *Atchuta Nair* [1] Ghose on Mortgages Vol. I page 488; *Mulchand Kuber* v. *Lallu Trikam* [2] *Shyam Kumari* v. *Rameswar Singh* [3] Section 101 of the Transfer of Property Act requires that the mortgagee must become *absolutely* entitled to the property before there can be a merger. Here plaintiff is not the absolute owner, as there are still outstanding incumbrances. It does not make any difference that the question arises between the mortgagee and the mortgagor. If the contention of the other side is correct there can be a merger for some purposes and no merger for others. If there is no merger, the first-mortgagee can sue on his mortgage.

[*Wallis, C. J.*—When the plaintiff purchased the equity of redemption was there not an extinction of the debt?]

No Extinction can only be by payment. Here is merely a combination of two estates, *viz*, the mortgagor's estate and the first mortgagee's estate. It is competent for a person to transfer any one of these two distinct interests keeping the other to himself. This is what has happened in this case. The doctrine of merger as laid down in *Toulmin* v. *Steere* [4] has not been accepted in India. See S. 101 of the Transfer of Property Act. After all it is a technical doctrine and should not be extended beyond its strict limits.

K. Srinivasa Iyengar (in reply).

Here the question is not between the plaintiff and a puisne incumbrancer. No puisne incumbrancer is a party to the suit. There is no question of keeping alive. The matter may also be looked at in this way. When a person purchases property as between him and his vendor, he is liable to pay off the incumbrances to which the property was subject. See S. 55 cl. (5) (d) of the Transfer of Property Act. The plaintiff was the only person who had an incumbrance on the suit properties at the date of his purchase. Therefore when the plaintiff as the mortgagee bought the equity of redemption, he had to pay himself (*i.e.*,) the mortgage was extinguished. It is only if there are intervening charges or outstanding incumbrances that the plaintiff can hold his mortgage as a shield against them. Otherwise there is a merger. It is only to this extent that S. 101 of the Transfer of Property Act has departed from the rule in *Toulmin* v.

1. (1911) 21 M. L. J. 213.
2. (1882) I. L. R. 6 B. 404 at 413.
3. (1904) I. L. R. 32 C. 27.
4. 3 Mer. 120.

Steere [1]; See Halsbury Vol. 21 p. 323; Ghose on Mortgages Vol. I pp. 490, 491, 495; Shephard and Brown p. 373. *Mulla Veetil Seethi* v. *Atchutha Nair* [2] did not consider this point. *Syed Ibrahim Sahib* v. *Arumugathayee* [3], is in my favour.

The Court delivered the following

Judgments :—*The Chief Justice* :—In 1882 the 1st defendant executed a mortgage Exhibit A of the suit properties in favour of one Mahalinga Aiyar, who tranferred it on 15th August 1892 by Exhibit B to the father of the 1st plaintiff, whose son the 1st plaintiff was married to the 1st defendant's daughter. On the 13th February 1893 the plaintiff's father obtained a lease Exhibit E of the suit properties from the 1st defendant at a rent of Rs. 300 which would appear to have been an under value. On the 9th February 1897 the 1st defendant executed a fresh mortgage Exhibit F in favour of the 1st plaintiff's father for the amount found due on the mortgage, Exhibit A. Subsequently in December 1899, the 1st defendant's equity of redemption was sold in execution by a decree-holder (see Exhibit K) and as regards 9⅝ cawnies, was purchased at the Court sale for Rs. 182 by one Soundararaja Iyengar who a few days later by Exhibit III transferred the interest he had acquired to the 1st plaintiff for the same sum of Rs. 182. Between 4 and 5 years later the 1st plaintiff reconveyed the suit properties except the 9⅝ cawnies to the 1st defendant for Rs. 185. The document reads at first sight like an out and out sale but beneath the signatures of the vendor and his witnesses there is a further statement signed by the 1st plaintiff alone to the effect that the sale was subject to two mortgages one of which was the suit mortgage. In 1910 the 1st plaintiff and his sons instituted the present suit on the mortgage so reserved and obtained a decree and one of the main contentions raised by the present appellants who represent subsequent alienees from the 1st defendant is that the suit mortgage was extinguished when under Exhibit III the 1st defendant's equity of redemption in the suit properties was acquired by the 1st plaintiff. This acquisition must be considered to have been made on behalf of his joint family which included a younger brother, since the deceased and the 1st plaintiff's sons who are co-plaintiffs with him in this case, and it was treated

1. 3 Mer. 210.
2. (1911) 21 M. L. J. 213.
3. (1912) I. L. R. 38 M. 18.

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as joint family property *vide* Exhibit X and XI. It may therefore be said that by Exhibit III the mortgagees acquired the equity of redemption except as regards 9⅝ cawnies. The owners of these items are not parties to the present suit, and though the items acquired by them may be liable for their proportionate share of their mortgage debt, that does not appear to affect the question whether there has been a merger as regards the items of the mortgaged properties which have been acquired by the mortgagee.

This question of merger has recently been considered by the House of Lords in *Whiteley* v. *Delaney* [1], and by the Privy Council in *Bavani Kuwar* v. *Mathuraprasad Singh* [2]. As pointed out in the former case by the Lord Chancellor where the mortgagor himself has purchased the interest of the 1st mortgagee he cannot derogate from his own bargain by setting up the mortgage so purchased against a second mortgage created by himself. *Otter* v. *Lord Vaux* [3]. Next there is the case of a third party purchasing the mortgage property and paying off a prior mortgage out of the purchase money as in *Toulmin* v. *Steere* [4]. The Privy Council have held that decision to be inapplicable in India in *Gokul Doss's case* [5], and the Lord Chancellor in the case just cited, whilst refraining from expressing any opinion as to whether or not it was correctly decided, observed that it amounted to no more than this that in such circumstances the presumption was that the purchaser did not intend to keep the mortgage alive. So that even here the question was treated as one of the intention of the purchaser. Lastly we have cases like the present where it is an incumbrancer who acquires the equity of redemption (see *Hayden* v. *Kirkpatrik* [6]), and to these cases S. 101, Transfer of Property Act, expressly applies. The section is as follows :—"Where the owner of a charge or other incumbrance on immovable property is or becomes absolutely entitled to that property, the charge or incumbrance shall be extinguished, unless he declares by express words or necessary implication, that it shall continue to subsist or such continuance would be for his benefit". The word "absolutely" cannot mean that there are no mesne incumbrances outstanding as the very object of the exception to the section is to protect the prior mortgage against such incum-

1. (1914) A. C. 132.
2. (1912) I. L. R. 40 C. 89.
3. (1856) 2 K. and J. 650 ; 6 De. G. M. and G. 638.
4. 3 Mer. 210.
5. (1884) 11 I. A. 126.
6. (1865) 34 Beav 645.

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brances. When, as in the recent cases in *Bhawani Kuar* v. *Mathuraprasad Singh* 1, and *Laxman Ganesh* v. *Mathurabai* 2, there are no such incumbrances there can scarcely be any room for the exception and there is a merger under the section. In the former case, where under the Local Revenue law, land was sold for arrears of revenue subject to any mortgage subsisting at the date the arrears fell due, and it appeared that the arrears fell due, between the date when the mortgagee purchased the property under his mortgage decree and the confirmation of the sale to him, it was held that the mortgage debt was extinguished as from the date of the purchase and that there was consequently no mortgage subsisting at the date when the arrears fell due. The only mortgage of any of the suit properties effected by the 1st defendant subsequently to the suit mortgage and before he parted with his interest in the equity of redemption under Exhibit K was in favour of the father of the 31st defendant of items 53 and 56 for Rs. 160 under Ex. 19. The 1st defendant, whose evidence must be received with caution deposes that subsequently to the original mortgage Ex. A which was renewed by the suit mortgage Ex. F he executed two mortgages in favour of one Ramaswami Aiyar, a District Registrar, and these mortgages if still outstanding on the date of Ex. 3 would have been postponed to the suit mortgage. It appears, however, from Exhibit 43 and 44 that on the 7th December 1889 the 1st defendant sold two villages for Rs. 30,000 to one Thimma Reddi who undertook to discharge these mortgages out of the purchase money and as we find no reference to them either in Exs. F,L, or 19 and the mortgage deeds have not been produced, I think it is not shown that these mortgages were outstanding at the date of Ex. 3 so as to afford any ground for supposing that it was the intention of the 1st plaintiff to keep the suit mortgage alive as a protection against them or to bring the case within the exception to S. 101 of the Transfer of Property Act. The subsequent mortgage of two items only for the small sum of Rs. 160 under Ex. 19 could not effect the mortgagee's intention as regards the other items. We find the 1st plaintiff and his brother in 1901 pleading in the plaint Ex. 11 that by virtue of Ex. 3 the entire interest in the suit lands which were included in the properties mortgaged under Ex. F, belonged exclusively to them and in 1903 by Ex. 10

1. (1912) I. L. R. 40 C. 89. 2. (1913) I. L. R. 38 B. 369.

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they mortgaged the suit properties for Rs. 2,000 without any reference to any subsisting mortgage on them. In these circumstances and apart from Ex. L, I do not think it is shown that there was not a merger under the terms of S. 101, Transfer of Property Act, when the mortgagees acquired the equity of redemption under Ex. 3. As to Ex. L. I cannot agree with the Subordinate Judge that the reservation of the suit mortgage inserted out of its proper place in that document is sufficient evidence of an intention on the part of the mortgagees at the date of the purchase of the equity of redemption some five years previously to keep alive the suit mortgage. It might be otherwise if the purchase of the equity of redemption under Ex. 3 by the 1st plaintiff was benami for the 1st defendant but that is not the plaintiff's case and is negatived by the way in which the plaintiffs subsequently dealt with the property as full owners. If there was a merger under Ex. 3 the suit mortgage was discharged and the suit as framed must fail. The Subordinate Judge has dismissed the suit as regards some of the subsequent alienees for value from the 1st defendant on the ground that the 1st plaintiff attested the conveyance under which they claim, but has overruled that plea in the case of the present appellants in the absence of such attestation. Even if the facts do not amount to an estoppel the conduct of the 1st plaintiff in executing Ex. L in a form which at first sight represents the 1st defendant as purchasing free from incumbrances, and his subsequent conduct in treating the 1st defendant as full owner and attesting alienations by him to third parties, would appear to have misled the present appellants, and having regard to these and to other suspicious circumstances going to the foundation of the plaintiff's claim I think it sufficient to say that that claim fails as laid and that the appeal must be allowed and the suit dismissed with costs throughout.

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Seshagiri Aiyar, J.—I entirely agree with my Lord.

The 1st defendant was the owner of the properties in the suit. He mortgaged them to the father of the 33rd defendant in 1882 (Ex. A.) The 1st plaintiff's father obtained an assignment of that mortgage (Ex. B) in 1892. Some payments were made towards the debt. Finally in 1897 the 1st defendant executed Ex. F for the debt remaining unpaid under Ex. A to the 1st plaintiff's father. Previous to it a lease (Ex. E) was granted to the mortgagee for a period of ten years

from 1893. The 1st plaintiff's father was in possession under that lease. The rent reserved was only Rs. 300 a year which on the evidence was far below what the 1st defendant could have got as income from the mortgaged property. It was suggested that this low rent was paid as the arrangement was that the 1st plaintiff's father should pay himself the amount due under the mortgage from the surplus income. But there is no clear evidence of this agreement, while the 1st plaintiff's father was in possession, a money decree was obtained against the 1st defendant by a third party, and in execution of that decree the equity of redemption in the mortgage properties was purchased by one Sundararaja Iyengar for Rs. 185. It was said that this purchase by Sundararaja Iyengar was really benami for the plaintiff. There are recitals in some of the documents which show that Sundararaja Iyengar was only a namelender for the 1st plaintiff; but it is not necessary to pursue this matter further, because nothing turns upon it. Sundararaja Iyengar conveyed the equity of redemption purchased by him to the 1st plaintiff by Ex. III in 1900. The 1st plaintiff sold to the 1st defendant all his right, title and interest in the properties subject to a reservation, which I shall refer to later on under Ex. L on the 30th June 1905. It is proved that after this purchase by the 1st defendant he either sold or mortgaged the properties as if he were absolute owner thereof. On the 20th March 1906 he mortgaged to the 6th defendant some of the properties which were covered by Ex. L for Rs. 1,000 (Ex. XX). This was attested by the 1st plaintiff. By Ex. IV on the 27th April 1906 the 1st defendant transferred to his daughter another portion of the property. This again was attested by the 1st plaintiff. By Ex. II of the 13th May 1906 he transferred to his wife some property. On the 26th November 1906 she mortgaged to certain person another portion of the property under Ex. IX. Both these alienations were similarly attested by the plaintiff. On the 7th April 1907 the 1st defendant by Exhibit XV mortgaged to the 8th defendant some properties included in Exhibit L. By Exhibit XIII on the 10th May 1907 he mortgaged to the same person, the 8th defendant another property for Rs. 600. On the 15th August 1907 by Exhibit XVI he sold other properties to the 12th defendant. In all these documents whether attested by the 1st plaintiff or not, there are recitals which were calculated to induce the transferee

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to believe that the 1st defendant was the absolute owner of the properties he was dealing with. The 1st plaintiff instituted the present suit to enforce his mortgage rights under Exhibit A and F. No claim is put forward in respect of the reservation contained in Exhibit L. The basis of the 1st plaintiff's claim is that the mortgage of 1892 and of 1897 is still subsisting and that he is entitled to proceed against the properties for the debt due to him. The 1st defendant is the original mortgagor and the transferee of the rights of the 1st plaintiff in the equity of redemption. The other defendants are the alienees of the mortgaged properties from the 1st defendant. The defence of these alienees was that the right of the 1st plaintiff under the mortgages was extinguished by the transfer which he obtained from Sundararaja Iyengar of the equity of redemption. The Subordinate Judge came to the conclusion that as against those alienees whose conveyances or mortgages were attested by the 1st plaintiff, the 1st plaintiff is not entitled to rely on his mortgage to bring the properties in their possession to sale; but that the 1st plaintiff was entitled to proceed against the properties of the other defendants whose alienations were not attested by him (1st plaintiff). These latter defendants have preferred this appeal.

Before dealing with the questions of law argued by Mr. K. Srinivasa Aiyangar, it is well to point out that the 1st plaintiff is the son-in-law of the 1st defendant, and that the appellants are strangers to both the 1st plaintiff and the 1st defendant. The result of the conclusion at which the Subordinate Judge has arrived is to throw on the property in the hands of these appellants the whole burden of the mortgage debt amounting to Rs. 23,000 and odd. It is clear that these properties are not worth more than Rs. 16,000 or 17,000 at the utmost. There is no question that these appellants were *bona fide* purchasers for value. I am unable to accept the contention of the appellants that the 1st plaintiff is estopped by his conduct in attesting the sale deeds in favour of his wife and mother-in-law from now disputing that the 1st defendant had not an absolute interest in the properties. There is unfortunately no clear evidence that these appellants took the properties on the faith of the conduct of the 1st plaintiff. Although I have come to this conclusion I feel little hesitation in saying that this is an iniquitous attempt on the part of the 1st defendant to charge the whole mortgage debt

upon the properties in the hands of strangers after having secured to his relations with the concurrence of the plaintiff a large slice of the property originally mortgaged.

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One other circumstance may be mentioned. This suit is not based upon Ex. L which is a conveyance from the 1st plaintiff to the 1st defendant which also contains a reservation in 1st plaintiff's favour in respect of his mortgage. It was argued by the learned Vakil for the appellants that the clause in this document which says the "amount due to the said Viswanatha Aiyar is Rs. 2,000." This sum of rupees two thousand and the hypothecation right which I have and which is mentioned on the 1st page hereof are not discharged from the deed can have no effect as against the clear and unambiguous recital in the operative portion of the document. It has to be noticed that while the first portion of the document was signed and attested this later portion is not attested. It has been suggested that this latter clause was a memorandum made at the time of registration to enable the executant to pay less stamp duty upon the document than he would have been obliged to do if the property was conveyed free of encumbrances. This suggestion received support from the fact of the so-called reservation not being attested and also from the fact that subsequently the collector to whom the document was sent by the Registrar levied the full stamp duty on the document treating apparently the new clause as of no effect. It has also been argued before us that if in a deed the subsequent clause is consistent with the operative portion of it, effect should not be given to it; Norton on Deeds, p. 80 and the observations of Tindal, C. J. in *The Durham and Sunderland Railway Company* v. *Walker* [1], were quoted for that proposition. It is not necessary to give a decision whether the highly artificial rules of construction regarding deeds drawn up by solicitors fully conversant with conveyancing can be applied to documents executed in this country. The cardinal principle which should guide Indian Courts in such matters is to ascertain the intention of the parties. Technical rules of construction should as far as possible be avoided. Therefore I do not rest my decision upon the construction to be placed on Exhibit L. This suit was not based upon that document; it is not necessary in the view I am taking to decide whether by this memorandum at the end of the document

1. 2 Q B. D. 940 at 967.

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the 1st plaintiff reserved to himself the right to proceed against the properties. Exhibit L will be relevant in considering whether the alienees who must be deemed to have had constructive notice of its contents understood the documents and the other evidence bearing on the question will be considered in that connection.

The main point for decision is whether by the purchase of the equity of redemption from Sundararaja Aiyangar, the 1st plaintiff's mortgage debt was extinguished. Mr. Srinivasa Aiyangar, contended that if there are intervening incumbrances, the purchaser of the equity of redemption may use his mortgage as a shield to protect himself against them: but that he could not sue upon his mortgage. There is no document from the 1st defendant to the 1st plaintiff which secures any right to proceed against the property in the hands of the former. S. 101 of the Transfer of Property Act was relied upon very strongly by Mr. Venkatachariar for the respondent. That section was intended to introduce with some limitation the rule of law enunciated in *Toulmin* v. *Steere* [1]. That decision has been the subject of considerable adverse criticism in the English Courts. Quite recently, the House of Lords in *Whiteley* v. *Delaney* [2] discussed that Judgment. Some of the observations of the learned Lords who delivered their opinions indicate that this case is no longer a binding authority. However that may be, Courts in India are governed by the statutory provision contained in S. 101 of the Transfer of Property Act. It is clear that section contemplates the existence of puisne incumbrances. Unless that be the object the clause relating to the subsistence of the encumbrance being for the benefit of the purchaser can have no meaning. The person who becomes absolutely entitled to the property cannot reserve in his favour and as against himself his own mortgage. As I read the section it leaves untouched the general rule of law that when a mortgagee purchases the equity of redemption the encumbrance in his favour is extinguished. It only enacts that where there are other mortgages on the property an intention will be imputed to the mortgagee purchaser that he intended to keep alive his own mortgage as a protection against subsequent claimants. The discussion in the House of Lords in the case already referred to shows that the rule enabling the purchaser to fall back on his mortgage is an infringement of legal rights. Consequently a strict construction

1. 3 Mer. 210. 2. (1914) A. C. 132.

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should be placed on this provision of law. I am of opinion that mortgagee purchaser can use his previous mortgage only as a shield if there are mesne encumbrances, and that also only in respect of the properties which are covered by such encumbrances. I shall deal with the question whether there were any subsisting encumbrances at the time the equity of redemption was purchased later on. Even if there are such encumbrances, I am of opinion that the mortgagee purchaser is not entitled to sue upon his mortgage. I am also of opinion that the 1st plaintiff did not intend to keep alive the first mortgage for his benefit. The clause in Exhibit L reserving such a right is suspicious. The relationship of the parties (son-in-law and father-in-law) suggests that the 1st plaintiff parted with his absolute rights. It is true that low price for which the sale was effected is an element for consideration. As against this there is the fact that upon the properties of the value of over Rs. 50,000 the 1st defendant recovered only Rs. 300 a year for 10 years. It may be that the son-in-law parted with his full rights in view of his having enjoyed the large income from the properties. There is the further fact that after transfer under L absolute conveyances attested by the 1st plaintiff were effected of the properties. The 1st plaintiff could not have intended to reserve his mortgage rights when he knew that these properties were to be sold to his own wife and mother-in-law. To my mind the relationship of the parties, the enjoyment of a large income by the 1st plaintiff without accounting for it to the 1st defendant, and the subsequent conduct in attesting conveyances, all show unmistakably that the 1st plaintiff never intended to keep his mortgage alive. Further the 1st plaintiff before the sale to the 1st defendant conducted proceedings as absolute owner; see Exhibits XI, S. X and Q. 4. It is clear from these documents that it was not for his benefit to regard himself as a mortgagee.

The contention that the purchaser has two distinct and separate interests in the property in all cases where there are mesne encumbrances found favour with Mookerjee, J., in the case reported in *Bhawani Koer* v. *Mathura Prasad* [1], but the Judicial Committee reversed this decision. See *Bhawani Kuar* v. *Mathuraprasad Singh*[2]. The observations of their Lordships leave no room

1. (1907) 7 C. L. J. 1 at 32. 2. (1912) I. L. R. 40 C. 89.

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for doubt that where there are no encumbrances there is an extinguishment of the right under the mortgage when the equity of redemption is acquired. *Laxman Ganesh* v. *Mathurabai*[1] and *Munna Lal* v. *Munna Lal*[2] are to the same effect. In *Ramu Naicken* v. *Subbaraya Mudali*[3] it was decided by this Court that the mortgage right can only be used as a shield against puisne encumbrances. Considerable stress was laid down on behalf of the respondent upon the decision of the Full Bench in *Mulla Veetil Seethi* v. *Atchuta Nair*[4]. In that case, there was first a simple mortgage: then the mortgagor granted a usufructuary mortgage. The first mortgagee became the owner of the equity of redemption by purchasing it at a sale in execution of a decree in a suit on his mortgage to which the usufructuary mortgagee was not a party; and then brought a suit to recover possession of the property from the usufructuary mortgagee. The learned judges held that he was not entitled to possession, the ground of decision being that the first mortgagee can only claim to stand in the shoes of the mortgagor and as the mortgagor had given a usufructuary mortgage the first mortgagee purchaser acquired no right to sue for possession. There can be no question that this conclusion is correct. But the respondent's vakil relies upon certain observations in the judgment for the position that where there are puisne encumbrances, the first mortgagee purchaser can never get an absolute title to the property. In page 225 it is stated: "Merger, on principle is impossible, for the case of the first mortgagee acquiring the equity of redemption when a second mortgagee is still outstanding is not one of the rights and correlative obligations coalescing in the same person, or of a small interest getting absorbed by a larger, or of two contiguous interests carved out of property combining to form a larger whole." No authority is quoted for this broad proposition excepting an extract from Lindley's Jurisprudence, Appendix 57 and 58. I may mention that the term merger is not appositely used in this connection. The rights of puisne encumbrances are neither lost nor *merged* in the title acquired by the mortgagee purchaser. They would be outstanding. See S. 55 cl (d) of the Transfer of Property Act. The only question is whether the first mortgage is capable of enforcement as such in a suit founded on it. If it was intended to

1. (1913) I L.R. 38 B. 369.
2. (1914) I. L R. 36 A. 327.
3. (1873) 7. M.H.C. R. 229.
4. (1911) 21 M. L. J. 213.

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lay down that it is open to a mortgagee-purchaser to sue on his mortgage, to foreclose the later mortgages, I respectfully dissent from that conclusion. In my view the mortgage was extinguished when the 1st plaintiff acquired the equity of redemption and it is not open to him to sue upon it whatever it may be his rights to use the mortgage as a defence against puisne encumbrancers, see *Syed Ibrahim Sahib* v. *Arumugathayee* [1]. Moreover there is no satisfactory evidence in this case of any subsequent mortgages having subsisted at the time the equity of redemption was purchased from Sundararaja Aiyangar. The question was not argued before the Subordinate Judge; the documents creating these mortgages have not been exhibited. But reliance is placed upon two judgments in which reference is made to them. Those judgments do not show that the mortgages were valid and subsisting at the time when the equity of redemption was acquired by the 1st plaintiff and his predecessor. On the other hand, Exs. 43 and 44 show that the previous encumbrances were intended to be paid off in 1889. *Non constat* they have not been discharged.

I would therefore allow the appeal and dismiss the suit against these defendant appellants with costs here and in the court of first instance.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Oldfield and Mr. Justice Tyabji.

Sri Raja Bommadevara Satyanarayana Varaprasada Rao Naidu Bahadur Zamindar, minor by guardian Collector of Kistna as agent to the Court of Wards. *Appellant in all. (3rd Deft. in S. A. Nos. 689 & 691 of 1912 and 2nd Deft. in S. A. Nos. 690, 692 & 693 of 1912).*

Desika Sriramulu, and others ... *Respondents in all. (Plaintiffs Nos. 1 & 2 and 4 to 6).*

Sri Raja Bommadevara Satyanarayana Varaprasada Rao v. Desika Sriramulu.

Civil Procedure Code S. 11—Res judicata—Suit against Government and Zamindar for refund of water-cess—In first Court Zamindar's liability not determined—In Appellate Court found but no decree given as memo of objections out of time—Claim against Zamindar for refund of water-cess and penalty,—Former recoverable under S. 70, Contract Act—latter in proof of improper conduct—Pre-settlement Inam—Claim against Zamindar inadmissible.

Where a tenant claimed a refund of water-cess paid by him from the Government as well as from the Zamindar but the Munsiff gave a decree only against the Government, without considering the latter's liability, in his view the relief against

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* S. A. Nos. 689 to 692 of 1912. 8th April, 1915.

1. (1912) I. L. R. 38 M. 18.

Sri Raja Bommadevara Satyanarayana. Varaprasada Rao v. Desika Sriramulu.

the Government being ample, but on appeal by the Government the Government was held not liable, the Appellate Court holding that the Zamindar alone was liable but as the cross-objections filed by the plaintiff were out of time, no decree was given against the Zamindar.

Held in the circumstances, the question of the Zamindar's liability was not *res judicata*, either in his favour or against him when his liability for subsequent years came in question.

Where the plaintiff's case was that his lands were mamool wet but that the Zamindar fraudulently represented that they were not and got exemption from water-cess for some other lands in the Zamindari instead and as a consequence the Government levied water-cess and penalty from the plaintiff.

Held that his claim for refund of water-cess might be sustained on S. 70 of the Contract Act but that the claim for the penalty levied could be sustained only on proof of improper conduction the part of the Zamindar.

But held the finding that the plaintiff's inam was a pre-settlement inam cut the foundation of his claim.

Second Appeal against the decrees of the Court of the Subordinate Judge of Kistna at Ellore in Appeal Suits Nos. 34, 36, 35, 37, and 38 of 1911 respectively, preferred against the decrees of the Court of the District Munsif of Ellore in Original Suits Nos. 218 of 1905, 454 of 1908, 537 of 1906, 541 of 1907 and 728 of 1909 respectively.

These Second Appeals and the memo of objections came on for hearing on Monday and Tuesday, the 1st and 2nd days of December 1913 and having stood over for consideration till Tuesday, the 23rd day of December 1913 the Court delivered the following.

S. Swaminadhan for Appellant.

V. Ramesam for Respondent.

Oldfield, J.

Judgments:—*Oldfield J.*—Plaintiffs respondents are ryots holding under 3rd defendant—appellant—a Zamindar, who represents 2nd defendant, now deceased. 1st defendant is the Secretary of State. Plaintiff's case is that their holding is mamool wet inam and has always been held as such without payment of rent or water rate. So long as the Zamindar made the collection of water rate on behalf of Government, there was as between him and Government no necessity to ascertain the identity of the mamool wet lands, since he could simply deduct the amount corresponding with their total extent from the total sum otherwise payable by him. When, however, before fasli 1312 he abandoned the collection, an ascertainment of the mamool wet became necessary; and owing to the incorrect information, which

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2nd defendant's servants gave. Government represented by 1st defendant, collected water rate from plaintiffs, which they were not liable to pay, since their land was manool wet. They sue to recover the payments made under protest for fasli 1314. Their payments included not only the ordinary water rate, but also the penal water rate imposed in consequence of their having taken water without application.

The foregoing represents plaintiffs' case as stated in their plaint, its foundation as regards both the ordinary and penal water rate being given as against 2nd defendant as his tortious act in giving incorrect information to 1st defendant. The Court of first instance however in its judgment (after remand) dated 21st September 1910 treated the claim against the defendants as *res judicata* in circumstances to be referred to; and the Lower Appellate Court, holding that there was no *res judicata*, treated it as based on section 70 Indian Contract Act, observing that "the Zamindar had the benefit of the water for the rest of his lands to the exclusion of plaintiffs' inam" and presumably meaning that he had the benefit of plaintiffs' payment in consequence of the exemption of some part of the rest of his lands. It exonerated the 1st defendant, who is not a party to this appeal.

This, so far as the ordinary water rate is concerned, was a possible basis for the decision and may be regarded as covered by the very general issues framed. Moreover the grounds of appeal relating to the discrepancy between it and the pleadings have not been pressed as regards this part of the case. But, section 70 being in question, 3rd defendant's objection that the finding of fact above referred to is not supported by or has not been reached after consideration of the evidence must be allowed. The Court of first instance no doubt, after dealing with the case as one of *res judicata*, admitted all the evidence adduced, but it simply recorded its findings without discussion of it or reference to section 70; and the Lower Appellate Court found as stated above, also without applying its mind to the evidence in detail and without attempting to decide whether it did or did not support its assumption that the Zamindar had in fact been exempted from liability to an extent corresponding with the payment made by plaintiffs.

It is conceded that section 70 cannot justify plaintiffs' claim in respect of the penal portion of their payment and that it must

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be supported as one for compensation for the result of 2nd defendant's improper conduct. Neither of the lower Courts has dealt separately with this part of the case. As regards it also there must be a remand for a finding on fresh issues.

The question is next whether the dispute between the parties or any part of it is *res judicata.* The facts are that plaintiffs sued 1st and 2nd defendants in O. S. No. 434 of 1903 on allegations similar to those now before us for (1) a declaration that their holding was mamool wet inam (2) refund of water rate paid under protest for fasli 1312. Reference to the decree in the printed papers in this Court shows (what Exhibit A, the judgment, leaves obscure) that both reliefs were granted against 1st defendant, but only the first against 2nd defendant, the suit against him for the second being dismissed without costs. This result was not affected by the Appellate judgments, Exhibits B and CC, plaintiffs' memo. of objection against 2nd defendant having been filed after Exhibit A had become final. In these circumstances Exhibit A is *prima facie* an adjudication in 2nd defendant's favour, if not as to the nature of the holding, at least as to his obligations in respect of it. Plaintiffs' argument is then that incidentally to this disposal of their claim the matter in dispute was not heard or determined. They have not relied on the reasons adopted by the Lower Appellate Court.

Firstly as regards the nature of the holding, I have pointed out that the declaration claimed by plaintiffs was given against both defendants ; and, though plaintiffs have not so far pleaded *res judicata,* the fact will be important, when the issues remanded are dealt with by the Lower Appellate Court. At present the material facts are that, though Exhibit A para 17 contains the finding in plaintiffs' favour, it was expressed in para 12 only as follows :—"although I am prepared to find it proved that plaintiffs' holding is a wet inam, I think that it would be enough to find that the land is immemorial wet.........in other words plaintiffs have an easement right by grant or prescription to irrigate these fields.........when therefore the Government agreed with the Zemindar etc............it should be taken to contract with him as representing all concerned, that the new source shall be subject to all their customary rights." This I understand to mean (1) that, though the land was inam, that fact and the possible responsibility of the Zemindar for its irrigation were not material, because

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(2) it was mamool wet and entitled to receive water from Government on that ground. The Court adopted the second of these grounds and (perhaps because a decree against Government was considered by it a sufficient relief) refused to adopt the first as the basis of its decision.

The remainder of the judgment agrees with this,—since there is nothing in the ascertainment of the duties of the parties, which follows, inconsistent with the disposal of the case on the footing that the land is ordinary mamool wet, not wet inam, in connection with which the Zemindar might be under special liabilities. Though, as stated, there is a finding in para. 17 that it is wet inam, the other finding, that the collection of water rate was wrong, relates only to the act of Government. In the circumstances the decision must be that the Court declined to adjudicate on 2nd defendant's conduct and that there has been no determination of the claim relating to it.

The result is that there must be a remand on the basis that the character of the land as mamool wet inam is *res judicata* against 3rd defendant in consequence of Exhibit A, against which 2nd defendant did not appeal. The following issues must be tried:—

1. Whether in consequence of plaintiffs' payment 2nd defendant was exempted from any liability for water rate and was benefitted and (if so) to what extent?

2. Whether penal water rate was levied from plaintiff in consequence of any wrongful or negligent representation to 1st defendant or his servants, and (if so) whether 3rd defendant is bound to compensate plaintiffs and to what extent?

3. To what reliefs are plaintiffs entitled?

Fresh evidence may be adduced. The finding should be submitted in six weeks from the re-opening of the Court. Seven days are allowed for objections.

Tyabji, J.

Tyabji J.:—The plaintiffs are holders of land in the 2nd defendant's Zemindari which is a portion of the Nuzvid Estate. Their suit is against the Secretary of State and the Zemindar (the 1st defendant and the 2nd defendant's representative respectively) for a declaration that the plaintiffs are not liable to pay any water cess on the lands in their occupation, and for recovering back

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from the defendants the water cess levied from the plaintiffs at a penal rate.

It is not contended before us that the plaintiffs have any cause of action against the Secretary of State. For it is admitted that the Government were entitled to recover from the plaintiffs the water cess, even though as between the plaintiffs and the Zamindar no water cess may be due from the particular plots of land in the occupation of the plaintiffs. The Lower Appellate Court has however decided against the Zamindar and held that he is liable to refund the payment made by the plaintiffs.

It is argued for the Zamindar in this appeal that the decree against him is erroneous, on the ground that there was no cause of action disclosed as against him, and that in any case the matter is *res judicata* between him and the plaintiffs. With reference to the latter contention it is admitted that there were suits between the same parties in which the liability of the Zamindar on the same basis as in the present case was directly in issue. The Lower Appellate Court held that the decrees in those suits did not operate so as to make the question involved in the present suits *res judicata*: "First because the said Judgments relate to different faslies *i.e.*, the plaintiffs' claim for faslies 1311 and 1312 which was prior to Faslies 1314 to 1318; and secondly because the cause of action for the present suit is also different." The learned pleader who appeared for the respondent did not rely upon these reasons for contending that the matter was not *res judicata*, owing to the decision reported in *Bayyan Naidu* v. *Suryanarayana* [1].

The argument before us however was that in the previous suits as a matter of fact there was either no adjudication on the point at all, or, if there was, then it was in favour of the plaintiffs.

On referring to the records of the previous suits and appeals arising therefrom, it found that the District Munsif in the Court of First Instance decided the suits in favour of the plaintiffs: in doing so he purported "formally to record findings on the issues in favour of the plaintiffs." He seems to have considered the liability of the 2nd defendant in the preceding paragraph of his judgment where he says "on behalf of the 2nd defendant a curious argument was advanced..............The argument is advanced

1. (1912) 23 M. L. J. 543.

only for the purposes of this suit and is not *bona fide* ;" his decree embodied a declaration that the lands were mamool wet inam, which was a relief against the 2nd defendant also ; and he made the 2nd defendant bear his own costs, though the decree was otherwise only against the 1st defendant. Holding that the cess was not due on the lands, he held as a consequence that the plaintiffs were entitled to recover back the payments made by them. As the plaintiffs were not entitled to get the money twice over, and also perhaps because there was no question that if the Government were bound to repay the money they would repay it, his decree for repayment of the cess was only against the Government who had actually received the payment.

From the Munsif's decree that the lands in question were mamool wet, that the 1st defendant should refund the payments made by the plaintiffs, and that the 2nd defendant should bear his own costs there were appeals and cross-objections. The Subordinate Judge in appeal said: "that being the case it is clear that as against the 2nd defendant plaintiffs are entitled to get water for their land free of charge. If the Zemindar who was bound to include the extent of the plaintiffs' holding within the 120 and odd acres allowed in his favour by Government for irrigation free of charge, failed to do so, the fault was his and it seems to me that plaintiffs must look to him for the redress of their grievances so far as the Government are concerned. I fail to see how they are to blame for charging water rate from plaintiffs, because it is not plaintiffs' case that they have entered into any engagement with the Government by which they are entitled to irrigation free of charge. Under these circumstances the first Court was not right in directing the Government to refund to plaintiffs the water rate collected from them. I decide on the first point that since 1839 the plaint land has been enjoyed as mamool wet inam exempt from water tax but that the 1st defendant is not liable for plaintiffs' claim. I need not record any finding on the 2nd point as the first Court had not made the 2nd defendant liable and the plaintiffs' memorandum of objections in A. S. No. 198 of 1905 asking for the 2nd defendant also being made liable was presented out of time. The plaintiffs were served with notice of A. S. No. 198 of 1905 on the 9th December 1905 and their objection memo. was filed in Court only on the 25th November 1906.

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The decision of the Subordinate Judge was therefore that the plaintiffs were barred by limitation from asserting their rights against the 2nd defendant in the Appellate Court. There was a Second Appeal (S. A. No. 1735 of 1908) from the Appellate decree and the second appeal was dismissed.

Apparently therefore the only questions that can be considered to have been decided by the Courts in the litigation culminating in S. A. No. 1735 of 1908 were (1) whether the 1st defendant was liable to refund the cess and (2) whether a decree for payment could be given against the 2nd defendant or whether the plaintiffs' cross-objections were out of time. The 2nd defendant's liability with reference to the previous faslis was not really adjudicated upon: by the Munsif because in his view it was unnecessary, by the Appellate Court because the plaintiffs had not taken cross-objections in time. Giving its full force to the decision of the Appellate Court, we have no adjudication upon the points now arising.

Under these circumstances, to hold that the question of the liability of the 2nd defendant to refund the water cess in respect of the faslis 1314—1318 is *res judicata,* would be a denial of justice based on a fiction which is directly at variance with the facts, and which is not based on the principle underlying the doctrine of *res judicata* : that principle for the present purposes may be stated to be that neither the Courts nor the parties should be permitted to be harrassed by the same question being repeatedly brought up for adjudication. It has been held that with regard to the previous faslis the plaintiffs had forfeited the right to have their rights determined by the Courts. That is no reason why they should be placed under a similar disability in regard to the latter faslis, though the reason for the forfeiture is absent. This is in accordance with the decisions in *Chundur Coomar Mitter* v. *Sib Sundari* [1], *Nilvaru* v. *Nilvaru* [2], *Gungabishen* v. *Ragoonath* [3], *Balkishan* v. *Kishan Lal* [4].

The next question is whether the plaint discloses any cause of action against the 2nd defendant. The cause of action relied upon by the plaintiffs is as follows:—that the water cess which was levied from the plaintiffs was in fact due from other lands not in the occupation of the plaintiffs; that the 2nd defendant

1. (1882) I. L. R., 8 C. 631.
2. (1881) I. L. R., 6 B. 110.
3. (1881) I. L. R., 7 C. 381.
4. (1888) I.L.R., 11 A. 148.

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wrongfully represented to the 1st defendant that the lands from which water cess could be levied included the plaintiffs' lands that by reason of such representation the plaintiffs were made to pay the water cess though the lands in their occupation were not subject to the water cess: and that the said other lands were exempted from payment of the tax which would not have been exempted had the 2nd defendant represented the true facts. If all these facts are established by the plaintiffs then it would seem that the plaintiffs have made payments which the 2nd defendant was bound to make, under such circumstances that the plaintiffs would be entitled to be compensated by the 2nd defendant under Section 70 of the Indian Contract Act. In the alternative the plaintiffs' case may be stated to be that they have been compelled to make payments for the 2nd defendant (not intending to do so gratuitously) the benefit of which has been that other lands in which the 2nd defendant is interested have been exempted from payment of the water tax: this benefit has been enjoyed by the 2nd defendant; and in respect of it the 2nd defendant is bound to make compensation to the plaintiffs.

See *Wilson* v. *Glossop* [1] and *Suchand Ghosal* v. *Balaram Mardana* [2].

The plaintiffs, however, claim to recover back from the Zemindars the whole of the water cess paid by them to the Government and that was levied at a penal rate.

The question therefore will also have to be considered whether the plaintiffs had any cause of action in respect of the sum which they had to pay as a penalty. That question would depend upon whether such extra sum can be considered to be damages arising out of the facts above referred to.

On none of these questions have the Lower Courts given any express findings.

There are no findings on which we can proceed with reference to the question

(1) Whether the 2nd defendant represented to the 1st defendant that the lands referred to in the plaint did not form part of the lands exempted from payment of water cess; and if the answer to this question is in the affirmative.

(2) Whether the 2nd defendant obtained an exemption from payment of the water cess which would have been due

1. (1888) 20 Q. B. D. 354. 2. (1910) I. L. R. 30 C. 1.

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on other lands had he not made the said misrepresentation;

(3) Whether the penal rate of water cess was levied from the plaintiffs by reason of any act or omission on the part of the plaintiffs themselves which they ought to have done or abstained from doing;

(4) Whether even if the misrepresentation above referred to had not been made by the 2nd defendant still the plaintiffs would have become liable to pay water cess at a penal rate; and

(5) Whether if the 2nd defendant had not made the misrepresentation referred to in the first issue then the penal rate of water cess would in the events that have taken place have become due from lands other than those referred to in the plaint, and would have been payable by the 2nd defendant.

It seems necessary therefore to send the case back for findings on the issues, which are mentioned in my learned brother's judgment.

[In compliance with the above order of this Court, the Subordinate Judge of Kistna at Ellore returned a finding, That the plaintiff's inam, being a pre-settlement inam, there was no duty on the part of the Zemindar to have the plaintiff's land localised as a mamool wet and also that his lands could not have been included in the mamool wet area in the Zemindari and as such he had no cause of action against the Zemindar.]

This Second Appeal and the memorandum of objections came on for final hearing after the return of the finding of the Lower Appellate Court upon the issues referred by this Court for trial.

The Court delivered the following

Judgment:—It is now found that the plaintiff's land is a pre-settlement inam. This finding cuts at the foundation of the plaintiff's case. The appeal must be allowed and the plaintiff's suit dismissed with costs throughout. The memorandam of objections is also dismissed with costs.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

[FULL BENCH.]

Present:—Sir John Wallis, *Kt.*, Chief Justice, Mr. Justice Sadasiva Aiyar and Mr. Justice Sreenivasa Iyangar.

Narayanaswamy Aiyar ... Appellant * (*Plaintiff*)

v.

D. Venkataramana Aiyar and another ... ... Respondents. (*Defendants*).

Narayana-swamy Aiyar *v.* Venkata-ramana Aiyar.

Madras Estates Land Act Ss. 213, 189, 134—Ryotwari Land-owner—Distraint excessive—Suit for damages—Jurisdiction—Revenue Court.

A suit by the tenant of a Ryotwari Land-owner or of any sub-tenant of such for damages for illegal distraint of moveable property, growing crops of the produce of land or trees in the defaulter's holding is solely cognizable by the Revenue Court.

Second Appeal against the decree of the Court of the Temporary Subordinate Judge of Coimbatore in Appeal Suit No 20 of 1913 preferred against the decree of the Court of the Additional District Munsif of Tirupur in Original Suit No. 858 of 1910.

This Second Appeal coming on for hearing before (Sadasiva Aiyar and Napier, JJ. Their Lordships made the following

ORDER OF REFERENCE TO THE FULL BENCH:—

Napier, J.:—This is an appeal from a judgment of the Temporary Subordinate Judge of Coimbatore dismissing a suit brought by one Narayanasawamy Aiyar, a sub-lessee of certain ryotwari lands against the ryotwari owners to recover damages for an alleged illegal distraint by the defendants for rent, the ground for the dismissal being that the District Munsif's Court had no jurisdiction to entertain the suit.

The plaintiff together with his immediate lessor had previously instituted a suit in the Revenue Court against the same two defendants under Section 95 of Madras Act I of 1908 praying for the cancellation of the attachment of the crops and costs and such further and other relief as the Court might deem fit. The Deputy Collector directed that one Palani Mudali, the other co-lessor of the plaintiff, should be added as plaintiff, and this was done. Subsequently the three plaintiffs withdrew their suit stating that they intended to bring a fresh suit for damages before the Civil Court.

* S. A. No. 1098 of 1914. 4th August 1915.

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The Lower Appellate Court held on the construction of Section 213 , and the schedule of the Madras Estates Land Act that the Civil Court had no jurisdiction.

The Madras Estates Land Act (Act I of 1908) was passed to amend and declare the law relating to the holding of land in estates. An estate is defined by Section 3 of the Act as being the whole or any part of any permanently settled estate or zamindari, any unsettled palaiyam or jaghir, certain plots in village inams and any portion of such villages. Admittedly land held under ryotwari tenure does not come within the definition of an estate. We find, however, that one chapter of the Act has been made partially applicable to such holdings. This is chapter VI, which deals with the recovery of rent by suit or by distraint and sale of movable properties or of the holding. Section 77 of that chapter entitles a land-holder to bring a suit before the Collector for the recovery of the arrear of rent and also to distrain the produce of the land or trees in the defaulter's holding. The distraint complained of in this suit was of the produce in the defaulter's holding, though the crops distrained belonged to the sub-lessee.

S. 96 entitles a defaulting ryot or cultivator to file a suit before the Collector to set aside the distraint within 15 days from the date of the service of notice by the sale officer on the defaulter under S. 95. It was under this provision that the lessee from the ryot and his sub-lessee brought their suit in the Deputy Collector's Court. S. 134 is as follows :—"The provisions contained in this chapter for the recovery of rent by distraint and sale of movable property shall apply, as far as may be, to the recovery of rent by a land-owner under the ryotwari settlement from a tenant from whom he has taken a written agreement." The first thing to be noticed is that S. 134 does not extend to a ryotwari land-owner the whole of the rights given by chapter VI. It does not entitle him to bring a suit before the Collector to recover his rent. Nor does it entitle him to exercise the powers given to a land-holder of selling the holding. The omission of these two powers of land-holder from the section throws, in my opinion, considerable light on the extent to which the other sections of the chapter are applicable. The Revenue Court has no jurisdiction to entertain a suit for rent and it has no jurisdiction to permit the sale

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of the holding; that is to say, where the remedy requires the intervention of the Collector, the procedure is not applicable to ryotwari holdings. No permission or intervention of a Revenue Officer is required for the exercise of the right of distraint and it is only after the property has been distrained and it is sought to recover the amount by the sale of the property that any public officer intervenes. That is the sale officer referred to in S. 79, a statutory official created by Act VII of 1839. This officer's position is analogous to that of a Sheriff with regard to sales in execution. S. 2 of the Act referred to is as follows:—"All Tahsildars shall be vested with powers of Commissioners for the sale of property distrained for arrears of rent or of revenue". His functions have always been the same whether he was selling the property taken by the process of distress under the provisions of the Rent Recovery Act (Madras Act VIII of 1865) or the Revenue Recovery Act (Madras Act II of 1864) (*Vide* Section 2 of the former Act and Section 9 of the latter). It is therefore clear that so far as the procedure for recovery of arrears by distraint is concerned there is no intervention by the Collector. Turning again to Section 134 of the Madras Estates Land Act, we find that the provisions applicable are limited to those for the recovery of rent and they are made applicable by sub-clause 2 to the recovery of rent. No section in this chapter which does not provide for the recovery of rent is applicable to the case of ryotwari tenants and no portion of any section which does not deal with the recovery of rent is applicable either; and further the language being "shall apply to the recovery of rents by a land-owner," any provision under which a person whose property has been distrained can seek relief is not applicable either, such provision not being one for the recovery of rent by a land-owner. This conclusion based on the strict language of the section is, in my opinion, fortified by the examination of the procedure in the remaining sections. In my view all the section does is to make statutory provision for the exercise of the right of distraint by a ryotwari land-owner and to provide certain formalities for the protection of the lessee. It was not intended to give the Revenue Court any jurisdiction to entertain a suit either by the land-owner to recover the rent or by the tenant to set aside the distraint. I now turn to the other provisions of the Act. Section 189 provides that a collector shall

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hear and determine all suits and applications of the nature specified in parts A and B of the schedule. The schedule contains an enumeration of suits. One of them is by a ryot to set aside distress under Section 95. This description obviously does not apply to a ryotwar tenant, for admittedly he is not a ryot within the meaning of the Act. And it is a fair observation that the failure to provide for a suit by any other person to set aside a distress is an indication that the procedure under S. 95 was not intended to be made applicable to persons other than ryots. The last description in Schedule A is a suit for damages not otherwise provided for. The Subordinate Judge applies Section 213 to this description of suit—the language of Section 213 is "any person deeming himself aggrieved by any proceeding taken under the colour of this Act, or by neglect or breach of any of its provisions shall be at liberty to seek redress by filing a suit for damages before the Collector"—and holds that Section 189 ousts the jurisdiction of the Civil Court with reference to any dispute or matter in respect of which such suits might be brought. In my opinion, this is giving too wide a meaning to the words "for damages not otherwise provided for." Section 213 itself does not bar the right of action in a Civil Court, unless that right of action is taken out of the jurisdiction of the Court by the Act. If the words in the schedule are to be given the wide meaning contended for, then the provisions of sub-sections 2 and 3 of Section 213 are nugatory. Therefore some limitation must be put on the words "damages not otherwise provided for." It is extremely difficult to say what those limitations are and I do not propose to consider any case other than the one before us.

As pointed out above, nothing but the provisions laying down the procedure for distress is incorporated in the law governing the relations between a ryotwari land-owner and his tenant. It seems to me, therefore, that the legislature, which refrained from extending the right of suit under S. 95 to such a tenant, cannot have intended to make the Collector's court the sole court in which a tenant could seek damages for an illegal distraint. The suit under S. 95 is one to contest the distraint. In nature it does not differ from one for damages; and as the former is not extended to the ryotwari tenant, I cannot think that the legislature intended to bar his suit in the ordinary court by the wide words "for damages not otherwise provided for" in the schedule. I am

inclined to the view that the schedule suits are all suits with reference to land in an estate. As the matter, however, is not free from doubt, and as my learned brother feels more difficulty in the matter than I do, I agree that the following question be referred to a Full Bench.

"Is a suit by the tenant of a ryotwari land-owner or of any sub-tenant of such for damages for illegal distraint of movable property, growing crops of the produce of land or trees, in a defaulter's holding solely cognizable by the Revenue Court"?

Sadasiva Aiyar, J.—I also think that it is appropriate that the question should be settled by a Full Bench. While Section 78 (paragraph 1) of the old Act VIII of 1865 allowed an unqualified right of resort to the Civil Court to obtain damages for acts "professedly done under the authority" of that Act, notwithstanding the "*summary suit*" remedy given by Section 49 of that Act to be filed before the Collector for that same relief of damages, Section 213, Clause 5 of the Estates Land Act gives a right of action in the Civil Court only in cases "not taken out of its" (the Civil Court's) "jurisdiction by this Act." Further—suits before the Collector are not distinguished by the designation of "summary suits" in the new Act, that is, distinguished from suits before the Civil Court. It seems also clear that resort to Civil Courts was intended by the new Act to be discouraged as far as possible. Suits which are not *for damages*, though arising from acts prefessedly done under the statute lie, no doubt, ordinarily in the Civil Courts (see *Ghouse Moideen Saib* v. *Muthialu Chettiar* [1].

This second appeal came on for hearing as per above order on Monday and Tuesday the 2nd and 3rd days of August 1915.

N. Srinivasacharya for Appellants.

I submit that the jurisdiction of the Civil Court is not ousted. Act I of 1908 deals primarily with estates. S. 134 of the Act gives the ryotwari land-owner a right to distrain for arrears of rent. S. 134 however does not extend to a ryotwari land-owner the whole of the rights given by Chapter VI. For example he cannot bring a suit before the Collector to recover rent. S. 134 does not give the Revenue Court exclusive jurisdiction. S. 213 (1) gives me a right to sue in the Revenue Court. S. 213 (2) Saves the jurisdiction of the Civil Court.

1. (1913) 26 M. L. J. 83 s.c. 14 M. L. T. 528.

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[*Wallis C. J.*—S. 134 gives the land-owner a special remedy. If you are aggrieved, you must go to the *forum* specially provided by the Act.] I submit there is a concurrent jurisdiction. See S. 91 of the Act.

L. A. Govindaraghava Iyer for the Respondent: The present suit is for damages for wrongful distraint and comes within S. 213 (1). But this section must be read with S. 189 which takes away the jurisdiction of the Civil Court. S. 213 (2) is inserted by way of abundant caution and does not in itself give jurisdiction to the Civil Court. The present suit comes within the Schedule Part A. No. 21. S. 189 covers the case and shuts out the jurisdictiction of the Civil Court. S. 91 cannot be construed so as to give concurrent jurisdiction. It merely gives a remedy in cases where, but for the section, the third person aggrieved by the Collector's order would be remedyless. If the contention of the other side is correct, then a ryot will be entitled to sue the landholder for damages for excessive distraint in a Civil Court as well as in a Revenue Court. The policy of the Act is to restrict resort to the Civil Courts as much as possible.

N. Srinivasacharya (in reply): S. 134 of the Act leaves the remedies of the tenant, intact. S. 213 (1) gives only a cumulative remedy. The common law rights of the ryotwari tenant, to sue for damages in the ordinary Civil Courts, is not to be taken away by implication. Under Act VIII of 1865, there was a right to resort to both the Civil and Revenue Courts. The new remedy is only cumulative. Maxwell, Interpretation of Statutes, Chapter V; *Zemindar of Ettiyapuram* v. *Sankarappa Reddiar* [1].

The Court expressed the following

The Chief Justice.

OPINION.—*The Chief Justice.*—I do not think that the fact the proceedings for the recovery of rent by distraint and sale of movable property which have given rise to this suit, were taken by a land-owner under ryotwari settlement pursuant to Section 134 of the Madras Estates Land Act, or the fact that the present suit was instituted in respect of proceedings so taken not by a tenant of such land-owner, but by a sub-tenant makes any difference, because in my opinion the effect of Section 134 is to enable such a land-owner though not governed by the

1. (1903) I. L. R. 27 M. 483-s. c. 14 M. L. J. 223.

general provisions of the Act to avail himself of the summary remedy thereby provided for the recovery of rent, and the effect of Section 213, (1) is to give "any person deeming himself aggrieved by any proceedings taken under the colour of this Act" a right to sue for damages before the Collector, words which are sufficient to give the Collector jurisdiction in a suit of this nature if filed before him.

The question is as to whether suits as to which jurisdiction is conferred upon the Collector under Section 213 (1) are withdrawn from the jurisdiction of the Civil Courts by Section 189.

Sub-sections (2) and (3) of S. 213 seem at first sight to suggest that it was contemplated that there should be concurrent jurisdiction in the Collector and the Civil Court in suits falling under sub-section (1) but as against this we have the express provisions of S. 189 which after collecting in Schedules A and B all the suits and applications to be entertained by the Collector mentioning in each case the governing Section goes on to provide explicitly that no Civil Court in the exercise of its original jurisdiction shall take cognizance of any dispute-matter in respect of which such suit or application might be brought or made. These provisions are express and I cannot find anything repugnant to them in the terms of S. 203 which would justify us in holding that suits which fall under sub-section 1 of that section are triable concurrently by the Civil Court. It is, I think immaterial whether the result of so holding is to leave little or no effective operation for sub-sections (2) and (3) for these sub-sections are in the nature of provisoes, and as pointed out in *West Derby Union v. Metropolitan Life Assurance Society* [1], it would not be legitimate to cut down the operative portion of Section 189 to which these provisoes do not in terms apply merely because otherwise the provisoes would be "meaningless and even senseless." What seems to me probable in this case is that sub-sections (2) and (3) which were drafted in place of Sections 49 and 78 of the old Act were retained by inadvertence after the jurisdiction of the Civil Court had been taken away by Section 189 in its present form. After all both sub-section (2) of Section 213 and Section 78 of the old Act are nothing but statements of of a well-known rule of statutory construction that the creation of new jurisdiction does not affect previously existing jurisdiction

1. (1897) A. C. 647.

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in the absence of express provision. I desire to say, though the point in my opinion does not arise for decision, that the effect of provisions of sub-section (2) is not to preserve a concurrent jurisdiction in the Civil Court in the case of suits under Section 91; in my opinion suits under Section 91 are exclusively within the jurisdiction of the Civil Court and do not come within the provisions of sub-section 1 of Section 213 giving the Collector jurisdiction, because I think that apart from Section 91 no suit would lie to call in question lawful orders of the Collector passed under S. 89 or 90 on the ground that the plaintiff was aggrieved by such lawful orders. The proceedings contemplated under Section 213 (1) are in my opinion unlawful proceedings done under the colour of the Act.

Next as regards sub-section (3) I find it difficult to accept the suggestion that the Legislature went to the trouble of enacting sub-section 3 for the purpose of saving the right to sue in a Civil Court for reliefs other than damages in respect of causes of action as to which suits for damages lie before the Collector under sub-section (1) even if sub-section (3) as drafted permits of such suits. These considerations here do not affect my judgment in the order in question and I would answer the reference in the affirmative.

Sadasiva Aiyar, J.

Sadasiva Aiyar, J:—It seemed to be admitted in the arguments on both sides that clause (2) of Section 213 of the Estates Land Act and the proviso which forms clause (3) of the same Section are somewhat ambiguously worded.

Reading however Section 213 (1), Section 189 and clause (2) of Schedule A together, I feel little doubt that the present suit (which is a suit seeking redress *by way of damages* and brought by a person feeling himself aggrieved by proceedings taken under the colour of Sections 77 and 134 of the Act) has been taken away out of the jurisdiction of the Civil Court. Clause 2 of Section 213 preserves the Civil Court's jurisdiction only in cases "not taken out of its jurisdiction by the Act" and suits *for damages* brought on particular causes of action are so taken away by Section 189 of the Act read with Section 213 clause (1) and Schedule A, 21. In other words, clause 2 of Section 213 saves the Civil Courts' jurisdiction only where the suit is not brought for the relief of pecuniary damages for proceedings taken under colour of the Act, that is, where it is brought for other remedies

(such as injunction, declaration, possession, etc.) if any, open to the plaintiff under the ordinary law. Similar provisions in other Rent, Revenue and similar Special Acts showing a reluctance on the part of the Legislature to take away the jurisdiction of Civil Courts over suits involving claims for other than pecuniary damages while conferring jurisdiction on Revenue Courts to entertain suits for the award of pecuniary damages in particular cases can, it seems to me be quoted in support of the above view. The proviso forming Clause 3 of Section 213 takes away the jurisdiction of the Civil Court even in respect of cases claiming other redress than pecuniary damages if the redress of damages had been already claimed by the plaintiff in a suit filed before the Collector under Clause 1 of Section 213.

After giving my best consideration to the whole matter, I agree with my Lord that the present suit is exclusively cognizable by the Revenue Court. It is unnecessary for the decision of this case to express a final opinion on the questions whether the remedy by a suit in the Collector's Court to set aside a distress under Section 95 can be availed of by a Government ryot's tenant whose movables have been distrained under Section 77 and whether assuming that he could do so, the jurisdiction is an exclusive one in the Revenue Court, Schedule A, Clause 10, referring only to a suit by a "ryot" under Section 95, and the word "ryot" being defined in Clause 15 of Section 3 of the Act so as to exclude a Government ryot's tenant from its connotation.

Srinivasa Aiyangar, J.

Srinivasa Aiyangar, J.—Defendants 1 and 2 who are landowners under ryotwari settlement with the Government availing themselves of the powers given them under Section 134 of the Madras Estates Land Act distrained the crops on the land of the plaintiff their tenant. The distrained crops were subsequently sold. The plaintiff complains that the distraint was illegal and files this suit for damages in the District Munsif's Court, Tirupur. The question is whether a Civil Court has jurisdiction to entertain a suit of this description. The solution depends on the correct interpretation of Sections 213 and 189 of the Estates Land Act. Clause 1 of Section 213 which corresponds to Section 49 of the repealed Rent Recovery Act, gives jurisdiction to Revenue Courts to entertain suits for damages filed by persons deeming themselves aggrieved by any proceedings taken under colour of the Act. That the present suit is a suit of that nature scarcely admits of doubt and

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Srinivasa Aiyangar, J.

the plaintiff if he had chosen could have filed the suit before the Collector. But this would not take away the jurisdiction of the ordinary Civil Courts and Clause 2 of Section 213 which corresponds to the 1st clause of Section 78 of the repealed Act, provides that "this section shall not be deemed to bar any right of action in a Civil Court in any case not taken out of its jurisdiction by this Act." Now Section 189 of the Act takes away the jurisdiction of the Civil Courts in respect of suits of the nature specified in part A of the Schedule to the Act and suits of the nature now in question are specified in the Schedule (see No. 21 of the Schedule). The words of the section are quite clear and unambiguous, and if the matter had rested there, there could be no doubt that a Civil Court could not take cognizance of this suit. But it is said that this construction renders the proviso to Section 213 meaningless, because there can hardly ever be a case to which it would apply. I think it quite possible to give a meaning to the proviso consistent with the construction I put on Section 189. Persons deeming themselves aggrieved by proceedings taken under colour of the Act are not confined to relief by way of damages. They may be entitled to ask for other reliefs such as an injunction, a declaration, or recovery of the specific property. (See *Zemindar of Ettyapuram* v. *Sankarappa Reddiar* [1]). Even if the appellant is correct in his contention that the proviso would be rendered nugatory by the construction I put on Section 189 following the principle of the decision in *West Derby Union* v. *Metropolitan Life Assurance Society.* [2] I should still come to the same conclusion as the words of Section 189 are quite clear and unambiguous.

I agree to the answer to the reference.

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1. (1903) I. L. R. 27 M. 488. 2. (1897) A. C. p. 647.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Sadasiva Aiyar and Mr. Justice Spencer.

V. Muthukumara Chetty ... *Appellant* in all cases* (*Plaintiff*)

v.

Anthony Udayan and others ... *Respondents* (*Defendants*).

Muthukumara Chetty *v.* Anthony Udayan.

Guardian—Lease in excess of power—Voidable—Avoidable by guardian only by suit—Avoidance in pais *by ward—Lease to enure beyond minority—Not void—Deed—Construction—Grant to mother and son for mother's life and the whole to the son after—Mother appointed guardian—Clause against alienation—Construction of—Not restriction on power as guardian—Transfer of Property Act S. 10.*

The Zemindar of Ghandarvakota made a grant in favour of his wife and son the operative words of which were as follows :—"I have given to the said Madurambal this day for herself and the other person (*i.e.* the minor son) and left in her enjoyment the buildings, gardens, etc.,............I have given to the said Madurambal for the said two persons for the maintenance, clothing, etc., of the said Madurambal and Rajagopalan (the son)". The deed was styled a settlement deed. It contained a provision that after the lifetime of Madurambal Rajagopalan should enjoy all the villages. There was also a clause prohibiting both the grantee and the grantor from alienating the property.

Held, upon the construction of the grant that the mother and son took jointly as tenants-in-common during the mother's life-time and on her death, the son took the whole that the mother was constituted a guardian of the minor son in respect of his interest in the property and that by the clause against alienation it was not intended to restrain the powers of the mother as guardian.

Held further that the grant was not one restricted to the grantees personally so as to preclude alienation.

Held also that the clause against alienation was invalid under S. 10 of the Transfer of Property Act.

A lease by a guardian is not void merely because it is intended to enure for a period extending beyond the minority of the ward.

A lease by a guardian in excess of his powers is only voidable and as such could not be pleaded by the tenants as a bar to the suit by the lessee for rent against them.

When one guardian whether natural or appointed has given a lease another guardian (in this case the father after the death of the mother) could not by an act of his own repudiate the lease or put an end to it. The only course open to him is to sue to set it aside.

Semble The minor himself may on attaining age put an end to it by an unequivocal act repudiating the transaction without resorting to a suit.

The lessee's title is perfected by the execution of the lease and the fact that he has not taken possession is immaterial except in so far as it may show that the lease was not intended to be a real transaction.

In suits instituted after the coming into force of the Estates Land Act, the non-tender of proper pattas is no bar to the suit, though the claim is in respect of faslis prior to the Act.

Second appeals against the decrees of the District Court of Tanjore in A. S. Nos. 216 and 335 and 338, 222, 223, and 340,

* S. A. No. 892 to 912 and 914 to 922 of 1911. 28th January 1914.

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224 and 341, 234 to 246, 248 to 250, 253 to 257 and 329 to 332 of 1910, preferred against the decrees of the Court of the Deputy Collector of the Tanjore Division in Summary Suits Nos. 183, 188, 199 to 192, 221 to 233, 291, 293, 297, 303, 306, 311, 315 and 316 of 1909 and 109 to 111 and 118 of 1908, respectively.

These second appeals came on for hearing on Monday, the 23rd September 1912, before (Sundara Iyer and Sadasiva Aiyar, JJ).

T. R. Venkatarama Sastri for Appellant.

G. Krishnaswami Aiyar and *B. Sitarama Rao* for Respondents.

The Court delivered the following

Judgment:—These second appeals arise out of suits instituted by the plaintiff against a number of ryots for rent of certain lands leased to them. The Zemindar of Ghandarvakota made a grant of these lands as well as of certain other properties evidenced by Ex. N in the case. The grant (which was in 1901) was in favour of two persons, his wife Madurambal and his minor son. Madurambal executed a lease Ex. I in 1906 for a period of 15 years to the plaintiff in these suits. She died within a few months after the execution of the lease. Disputes arose on her death between her husband, the Zemindar, who purported to act on behalf of his minor son and the plaintiff. There were criminal proceedings which were followed by two suits, one of them by the Zemindar on behalf of his minor son to set aside the lease and the other by the lessee to restrain the Zemindar from interfering with his enjoyment under the lease. The former suit was dismissed in consequence of the Zemindar's default in obeying an order of the Court to appear personally. The latter suit was withdrawn by the plaintiff in consequence of the dismissal of the Zemindar's suit. The propriety of the dismissal is, we understand, now before this Court in a revision petition. The present suits for rent by the lessee under Ex. I are resisted by the ryots, the minor grantee under Ex. I not being a party.

Most of the contentions on which the resistance is based depend on the construction of the grant Ex. N. These contentions may be briefly stated as follows :—

1. That the document created no right at all in the lands in favour of Madurambal or her son but only conferred rights of

management on the former with the right to appropriate the incomes for defraying the expenses of her own maintenance and the maintenance and education of her son;

2. That even if any estate in the properties, the subject matter of the grant, was created in favour of Madurambal, none was created in favour of the son till the death of Madurambal;

3. That according to the terms of the grant, the enjoyment of the property transferred was restricted to Madurambal and her son personally and therefore Madurambal had no right to make any transfer by way of lease in favour of the plaintiff;

4. That the lease is void apart from the previous contention on the ground that the grant expressly provides that the grantees should have no power of alienation by sale, mortgage or otherwise;

5. That Madurambal's right in the property ceased on her death and that she had no power to make a lease which would enure beyond her lifetime and that she was not appointed the guardian of her son by the grant;

6. That, even assuming that she was her son's guardian, all leases executed by her for a period which would extend, beyond the time of the son's minority must be regarded as void and at any rate would not last beyond the minority of the son;

7. That, even if a lease intended to last beyond the period of minority could be regarded as not altogether void, the lease in question was injurious to the interests of the minor and could not be upheld; and

8. That Exhibit I is not merely a lease but also a mortgage and as a mortgage is expressly forbidden by the terms of Exhibit N, Exhibit I must be held to be beyond the powers of Mudarambal. In the view we take in the case, it will not be necessary to deal with some of these contentions.

The first question for decision is whether Exhibit N, merely conferred upon Madurambal the right to manage the properties included in it and did not create any estate in favour of either the wife or the son. On this point we are unable to entertain any doubt that the document cannot be regarded as merely creating a right of management in favour of Madurambal. The instrument is called a settlement deed executed in favour of Madurambal and the minor Rajagopalan. It states "I have given to the said Madurambal Rajayee this day for herself and the other person

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aforesaid (that is the minor son) and left in her enjoyment the buildings, gardens and other immovable properties of the undermentioned villages worth Rs. 50,000 ;" and again it says "I have given to the said Madurambal Rajayee for the said two persons for the maintenance, clothing and other expenses of the said Madurambal Rajayee and..................Rajagopalan." There are no clauses in the instrument conflicting with the *prima facie* interpretation to be put on the clauses mentioned above, namely, that there was a grant of the lands. The provision regarding the exchange of pattas and muchilikas and the collection of kist by Madurambal was only intended to remove any doubts as to her power under Act VIII of 1865 to enforce payment of rent against the tenants. There is not a word in the document which would show that she was to be a mere agent or was to occupy a position analogous to that of an agent. There is a further provision that after the lifetime of the said Madurambal, the said Rajagopalan shall enjoy all the said villages. There can be no doubt that Rajagopalan obtained under the instrument an estate which would last for his life. It is not necessary for the decision of this case to express an opinion on the question whether Rajagopalan obtained an absolute estate under Exhibit N. That question may never arise for decision and if it should, it would probably arise not between him and any of the parties to this suit, but between him and some other descendant of the Zemindar. We, therefore, abstain from giving any opinion on the question. The view taken by the District Judge on the point discussed above is not quite clear. He finds definitely that the grantees did not obtain an absolute estate but only a limited estate but in one portion of his judgment he says "the arrangement contemplated by Exhibit N appears to have been very similar to that in the case reported in *Raj Lukhee Debi* v. *Gokhul Chandur Chaudri* [1], which was held not to create any absolute interest but only a trust for the management of the property for a particular purpose." But in the next sentence the opinion he expresses is that Exhibit N did not create any absolute interest in favour of Rajayee and her son. We do not think that the District Judge really intended to hold, as was argued for the respondent, that no estate or right in the property was created at all by Exhibit N. In the case referred to by him, the Privy Council

1. (1869) 13 M. I. A. 209.

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had to deal with a *Hibbannamah* or gift executed by the owner in favour of two widows, and the question raised for decision before their Lordships was whether the widows had an absolute right in the property which would entitle them to alienate it at their pleasure or whether they had only a limited interest, and the alienation was therefore invalid, not being supported by necessity. The widows were entitled to succeed as heirs of the owner and there was no question, therefore, that they had a limited interest. Their right to deal with the property in the manner and to the extent to which the holder of a woman's estate could, was admitted. Their Lordships say that there was no absolute estate but only a trust for the management of the property possessed by the widow. They did not intend, however, to negative the existence of a life-interest in the widows. We are of opinion that the District Judge also in this case meant no more than to hold that an absolute estate was not created in Madurambal and her son.

The next point is whether the son acquired no interest at all. The District Judge observes that Madurambal had no right to execute Ex. I on behalf of her minor son, because the latter took no estate under Ex. N. until her death. We are unable to agree with this view. It is perfectly clear from the document that the grant was to both and that Madurambal was to hold possession on behalf of herself and her son. Her right was to cease with her life and afterwards the son was to enjoy the whole. Both the mother and the son were created tenants-in-common during the lifetime of the mother after which the son was to hold the whole. We are of opinion that the son also did obtain an estate in the property under the grant.

The next question is whether by the terms of the grant the enjoyment of the property was restricted to the grantees personally. We do not think that there are any provisions in the document which would justify such an interpretation. The provision that Madurambal herself should give pattas and take muchilikas and collect the kist was not intended to restrict the right of enjoyment but to make it clear that she was to have powers with respect to the management which might otherwise be doubtful with respect to the provisions of Act VIII of 1865. There is no doubt the provision that the grant was for the maintenance of the grantees, but that is not sufficient to show that the enjoyment of

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the property was restricted to the grantees personally. Maintenance might be derived out of the property by the grantees without enjoying the property personally. Our attention was drawn to the fact that items 11 and 12 of the properties in the grant are stated to be intended for the education of the minor son. One of these two items was punjah land and the other was a plot of land with a building on it. There is no direction that the minor should live in the house, nor does it appear that the other item, the punjah land, was an adjunct to the land containing the building so as to form one entire plot where the minor was to live. The document is perfectly consistent with the interpretation suggested for the appellants that the income arising from both those items should be used to defray the expenses of the minor's schooling.

Reliance was placed on *Munisami Naidu* v. *Ammani Ammal* [1], where Subrahmania Iyer, J., held that a land granted to a widow for maintenance was not attachable in execution of a decree against the widow. That learned Judge followed another decision in *Devali* v. *Appaji Ganesh* [2], which held a similar view, but the question in those cases was whether the land in question would come within the purview of 'future maintenance' exempted from attachment by clause (*l*) of S. 266 of the Civil Procedure Code, (of 1882). There are various kinds of property which are transferable by the owner but which are exempt from attachment. The distinction was pointed out in *Rani Annapurni Nachiar* v. *Swaminatha Chettiar* [3], where this Court held that property given for maintenance is transferable and distinguished *Devali* v. *Appaji Ganesh* [2], and other cases which held that such property was not attachable. The general principle undoubtedly is that though a grant may prescribe the mode in which the grantee is to enjoy the property. such a provision would not be binding on him. See S. 11 of the Transfer of Property Act, S. 125 of the Succession Act and *Chamaru Sahu* v. *Sonakoer* [4]. A grant no doubt may be conditional on the grantee enjoying it in a particular manner; but where it cannot be construed to be conditional and there is a mere direction or request that the enjoyment should be in a certain manner, such a provision would not be binding. In *Rameswar Singh* v. *Jibender Singh* [5], it was held that *Babuana*

1. (1904) 15 M. L. J. 7.
2. (1886) I. L. R. 10 B. 342.
3. (1910) I. L. R. 34 M. 7 : 20 M. L. J. 785.
4. (1911) 16 C. W. N. 99.
5. (1905) I. L. R. 32 C. 683.

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grant for maintenance could be alienated. *Balaji J Rahalkar* v. *Narayan Bhat* [1], was not a case analogous to the present. There the lease was of a piece of land for building a house in which the grantee and his heir were to live. Couch, C. J. and Newton, J. held that there was no grant of any interest in the land except of a personal use for a particular purpose. We must overrule this contention also and hold that the enjoyment is not restricted by Ex. N personally to the grantees under it. The next question is whether the clause preventing alienation by the grantees is valid. S. 10 of the Transfer of Property Act enacts that where property is transferred subject to a condition or limitation absolutely restraining the transferee or any person claiming under him from parting with or disposing of his interest in the property, the condition or limitation is void. An exception is provided in the case of a lease where the condition is for the benefit of the lessor or those claiming under him. This section is applicable to Hindus unless any rule of Hindu Law be affected by it. It has frequently been applied both to Hindus and to Muhammadans. See the cases collected in Gour's Transfer of Property Act, page 184. The prohibition of alienations is absolute in this case. The grantees were not to alienate by sale, mortgage, etc., and the reasons for the prohibition is stated to be that the properties are intended for the maintenance of the grantees. There is also a provision that the grantor himself should not make any kind of alienation. Having regard to the reason stated for the restraint on alienation, there can be no doubt that the clause must be construed as preventing an alienation absolutely. There is no reason for holding that there is any rule of Hindu Law that alienations may be prevented in the case of grants for maintenance. The alienation, of course, would not be valid beyond the time that the grant itself enures. In the case, *Kuldip Singh* v. *Khetrani Koer* [2], all that was held was that a provision in an agreement between a widow and her husband's relations that an alienation should not be made without the consent of the relations was not repugnant to the provisions of S. 10, because alienation was not altogether forbidden but was only directed to be made subject to certain conditions.

Sri Bhagwat Singh v. *Ram Jatan* [3], in which the question was with respect to the rights of pre-emption was similar. None

1. (1866). 3 B. H. C. R. App. Civil 63. 2. (1898) I. L. R. 25 C. 869.
3. (1910) 7 A. L. J. 406.

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of these cases supports the contention that there is any specific rule of Hindu law making restrictions on alienation valid in grants which are made for maintenance. In speaking of Ex. N as a grant for maintenance, we are not to be understood as already stated, to express any opinion on the question whether the grant itself was absolute or would last only till the lifetime of Rajagopalan. The validity of even limited restraints on alienation is doubtful. See the matter discussed in *Chamaru Sahu* v. *Sona Koer* [1].

The next question is whether Madurambal had no right at all to make the lease on behalf of her son. We are clearly of opinion that Ex. N. constitutes Madurambal the minor's guardian. The document is executed to her both on her own behalf and on behalf of the minor who is described as being under her protection. She is to enjoy the estate for herself and for the son. The Zemindar evidently intended to make her his son's guardian so far as this property was concerned. The son was to live with his mother. It may be that the Zamindar did not part with his guardianship altogether and that the mother's power as guardian was restricted to this property, but there can be no doubt that she did become his guardian under Ex. N with respect to the properties comprised in it. The lease cannot, therefore, be objected to on the ground that Madurambal had no right to deal with the son's properties at all. Her powers must be taken to be those of a guardian. They are not restricted by any provisions in Ex. N. The restrictions against alienation referred to the estate created under the document and those restrictions were to apply equally to both the grantees, the mother and the son. They were not intended to and did not curtail any rights which the mother would possess as guardian to deal with the infant's estate.

The next question is, can the lease Ex. I be treated as void because it was to last for a period of 15 years which would extend to about 5 years beyond the minority of the son. If it was altogether void, then the defendants would be entitled to resist the plaintiff's attempt to collect the rents from them. But a lease executed by a guardian beyond his powers must be held to be not void altogether against the minor but only as voidable by him. This is the view held in England. See Halsbury's Laws of England, Volume 17, pp. 99 and 132. Only one case is referred

1. (1911) 16 C. W. N. 99.

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to—reported in 2 Wilson 129—that decided in Ireland where the lease was held to be void. In America also such leases are held to be only voidable—see 21 Cyclopaedia of American Laws and Procedure p. 86, although there also one case is referred to in which it was held to be void. The same view has been taken in India—see Trevelyan on Minors pp. 197 and 201, *Prosoonna Nath Roy Chowdry* v. *Afzolonessessa Begum* [1]. A sale by a guardian was also held to be only voidable in *Sham Chandra Dafadar* v. *Gadadhar Mandal* [2]. *Abdul Rahman* v. *Sukhdayal Singh* [3] is not a decision that a perpetual lease by a guardian is altogether void. Reference is made in it to a case where an unauthorised lease by a guardian was pronounced to be void, but the learned Judges refer also to the other cases where such a lease was held to be only voidable and their own judgment is based on a ground which would be equally applicable to both views. In *Bachchan Singh* v. *Kamta Prasad* [4], which was also relied on by the respondents all that was held was that Article 91 of the Limitation Act was not applicable to a suit by a minor to recover property improperly leased by the guardian. The case was taken to be governed by Article 141. It is not clear why Article 44 was not adverted to by the learned Judges.

Unni v. *Kunchi Amma* [5], was not the case of a transfer by a guardian. There are, no doubt, cases where a person affected by a conveyance may treat it as void but at the same time may ratify it. An alienation by a widow would seem to belong to this class of cases. The reversioner may accept the transaction as binding on him and ratify it, but if he does not do so he may sue for the recovery of the property within the time limited for suits for recovery of immovable property and is not bound to institute his suit within a shorter period treating it as one to set aside a document. See *Bijoy Gopal Mukerjee* v. *Krishna Mahishi Debi* [6]. According to *Unni* v. *Kunchi Amma* [5] an alienation by the manager of a Hindu family not binding on his co-parcener would also belong to this class, but an alienation by a guardian affecting the interests of a minor is treated as only voidable. Section 30 of the Guardian and Wards Act shows that this is the view taken by the Legislature. Article 44 of the Limitation Act would also

1. (1878) I.L.R. 4 C. 523.
2. (1912) 13 C. L. J. 277.
3. (1905) I. L. R. 28 A. 30.
4. (1910) I. L. R. 32 A. 392.
5. (1890) I.L.R. 14 M. 26.
6. (1907) I. L. R. 34 C. 329 (P. C.).

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seem to support the same view although the inference to be drawn from that article is not to be regarded as strong. We must therefore hold that the lease made by Madurambal was only voidable as against the minor.

From this conclusion emerges the contention of the appellant that it is not open to the defendants who are ryots to contend that they are not liable to pay rent to the plaintiff, so long as the lease has not been avoided according to law. The soundness of this contention is not disputed, but it is urged that the lease has been avoided. The minor himself has never repudiated it; his guardian, the Zemindar instituted the suit already referred to, to set aside the lease, but that suit failed without a decision on the merits. Now does this amount to an avoidance of the lease in law? We cannot uphold Mr. Rangachariar's contention that wherever a transaction is voidable it can be avoided only by getting a decree of Court setting it aside. The patry who is entitled to avoid may do so by an unequivocal act repudiating the transaction. See *Mata Din* v. *Ahmed Ali* [1], *Bijoy Gopal Mukerjee* v. *Krishna Mahishi Debi* [2].

If Rajagopalan after attaining majority should wish to repudiate the lease, there can be no doubt he can do so without a suit. But can any one else do so? The right to avoid appears to be a personal privilege—see 22 American Cyclopaedia p. 547. No doubt a suit may be instituted by a minor through a next friend to set aside a transfer by a guardian even during the time of minority, but the suit should be by the minor himself and the setting aside of the transaction would be the act of the Court. The Court is *parens patriae* and has the right to set aside transactions affecting minors. Thus it has been held that although a minor cannot make an alienation, a Court of Equity may do so on his behalf—see 22 American Cyclopaedia 516. Even when a suit has been instituted a next friend cannot make an election but a guardian *ad litem* may with the consent of the Court, in which case the election is practically made by the Court—see 22 American Cyclopaedia 662; at page 663 it is stated that a next friend cannot make a waiver. It has also been held that a minor is not bound by an election between two different remedies made by his guardian during his minority—see 21 American Cyclopaedia 186. It would seem that a minor himself cannot ratify a contract during his

1. (1912) 9 A. L. J. 215. (P. C.) 2. (1907) I. L. R., 34 C. 329. (P. C.)

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minority—(see Simpson on Infants p. 56, and also 22 American Cyclopaedia 539 and 21 American Cyclopaedia 106) because when the minor attains majority, he would not be bound either by his ratification or a conveyance made during minority. There is some authority no doubt for the proposition that a minor may avoid during minority a contract entered into by himself. But if he can do so it must be on the ground that the avoidance is not a contract and that the possession of sufficient discretion is enough to entitle the minor to perform an act of avoidance—see the observation of Jervis, C.J., in 17 Common Bench 685 at 691. No authority has been cited in support of the view that when one guardian has given a lease—whether natural or appointed—another guardian could, by an act of his own, repudiate the lease or put an end to it, and a minor, according to the authorities already cited, would apparently not be bound by any act of avoidance made by his guardian. No doubt a suit may be instituted on behalf of a minor during his minority to set aside the lease in order to get the Court to set it aside. We must hold that the Zemindar as the natural guardian could not set aside the lease by mere repudiation at his own pleasure and could do so only by obtaining a decree of Court. His action in instituting the suit cannot be regarded as standing on a better footing than any other act of his expressing his intention that the minor should not be bound by the lease. The result is that the lease must be held to be still operative against Rajagopalan. It is not necessary to consider the question whether it is one which would be set aside at his instance by a court or which he himself could repudiate on his attaining majority. As it is still operative against him, the defendants (ryots) could not resist the plaintiff's right to rent under it.

The District Judge observes in his judgment that the plaintiff did not obtain possession under the lease. We do not understand what exactly is meant by this or what the effect of his not obtaining possession is supposed to be. The ryots are in actual occupation of the land. The lease was only of the melwaram interest in the lands and the plaintiff's right under it is to receive rent from the ryots. The lease is sufficient title to entitle him to the rents. Even if the property leased were capable of tangible possession, the mere failure to obtain possession would be immaterial except to show that the lease was not intended to

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be a real transaction at all. In the result we hold that the plaintiff is entitled to recover the rent sued for. It is not necessary to express an opinion on the other questions raised and mentioned at the beginning of this judgment. The Deputy Collector was wrong in not giving a decree for faslis 1316 and 1317 on the ground that proper pattas were not tendered for those faslis. This Court has decided in several cases that in suits instituted after the coming into operation of the Estates Land Act the non-tender of proper pattas is not a valid objection to the suit. The decrees of the Lower Courts must be reversed and the plaintiff must have a decree as prayed for all the three faslis with costs throughout.

Second appeals Nos. 919 to 922 of 1911 having been posted to be spoken to on Friday, the 6th December 1912, the Court (Sundara Aiyar and Sadasiva Aiyar, JJ.) made the following

ORDER:—The District Judge has not recorded a finding on the question whether the amount of rent due for faslis 1316 and 1317 was discharged by the payment of peishkush by the defendants and we request him to submit a finding on that question.

The finding will be submitted within one month from the date of the receipt of this order and seven days will be allowed for filing objections.

[In compliance with the above order the District Judge of Tanjore submitted " that payment of peishkush by defendants in faslis 1316 and 1317 is not proved."]

These appeals Nos. 919 to 922 coming on for final hearing on Monday, the 26th January 1914.

The Court delivered the following

Judgment:—The finding is accepted and the plaintiff's claims for faslis 1316 and 1317 are allowed. The result as regards these four appeals Nos. 919 to 922 would be that the claims put forward in the plaints are decreed in their entirety with costs throughout.

As regards the other appeals Nos. 892, to 912 and 914 to 918 the suit out of which the Appeals Nos. 892, 893, 895 and 896 arose will be decreed in full with costs throughout.

As regards the other second appeals, the decrees will be drawn up in plaintiff's favour allowing the appeals in respect of the amounts claimed in the respective second appeal memoranda with

future interest and with costs in this and in the Lower Appellate Court, and the Lower Appellate Court's decrees will be modified accordingly. The award of rent for all the three faslis in all the suits made in the judgment of this Court dated 27th September 1912 under the impression that the rents of all the three faslis were in dispute in all the Second Appeals. It is now brought to our notice that in some of the appeals, the rent for fasli 1318 alone was in question. Hence, we have dealt also with the connected Second Appeals that is, connected with Nos. 919 to 922 in order to avoid mistakes and misapprehensions in drawing up the decrees in those cases.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Oldfield and Mr. Justice Seshagiri Aiyar.

Sivasamba Iyer ... *Appellant* *

v.

Kuppan Samban, Ponnan Samban and Periyanayagam, minor by guardian 2nd appellant ... *Respondents.*

Civil Procedure Code, S. 47, O. 21, R. 103—Execution Sale—Delivery of possession to decree-holder purchaser—Application by defendants to set aside, dismissal of—Appeal—Amendment,—Objection to, on the ground of limitation, when allowed in appeal.

In execution of the decree obtained by him, a decree-holder purchased the property of some of the defendants in the suit, though they had been exonerated from liability, by the decree. These defendants applied to set aside the delivery of possession to the decree-holder and the application was dismissed. *Held*, that the order of dismissal was one under S. 47 of the C. P. Code and was therefore appealable.

Where the Lower Court allows an application to be amended, an objection to the amendment, on the ground of limitation, will not be allowed to be raised for the first time in appeal, if the appellate court has no materials before it for the determination of the question of limitation.

Civil Miscellaneous Second Appeal against the order, and petition for the revision of the decree dated 24th day of November 1913 of the Court of the Subordinate Judge of Negapatam in Appeal No. 668 of 1913.

The facts are shortly these:-In O.S. No. 419 of 1909, in the Court of the District Munsif of Tiruvalur, the plaintiff obtained a decree directing the sale of 12 items of property. There were 13 defendants impleaded in the suit, of whom defendants 4 to 10 were exonerated

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* A. A. A.O. No. 30 of 1914, and C. R. P. No. 174 of 1914. 15th April 1915.

Sivasamba Iyer v. Kuppan Samban.

from liability, the suit being dismissed as against them. All the items were sold, the decree-holder being the purchaser. The sale was confirmed on 4—4—1911 and delivery of possession was made on 12—12—1912. On 11—1—1913 the defendants 6 to 8 in the above suit presented an application under Sec. 47 of the C. P. Code for setting aside the delivery of possession of items Nos. 11 and 12 on the ground that these items belonged to them. Subsequently, an amendment petition was put in praying for the delivery being set aside in respect of items No. 7 and 9 also. The amendment was allowed. The District Munsif of Tiruvalur dismissed the application of defendants 6 to 8 holding that they had not proved their right to the items in question. On appeal, the Subordinate Judge set aside the order of the Munsif and also the delivery of items Nos. 7, 9, 11, and 12. The decree-holder purchaser preferred an appeal against the appellate order, to the High Court.

G. S. Ramachandra Iyer for Appellants.

I submit that there was no appeal to the Subordinate Judge from the order of the District Munsif dismissing the application of the respondents. The application though ostensibly made under S. 47 of the C. P. Code was really under O. 21 R. 100 (1). Defendants 6 to 8, having been exonerated from the suit, are not "judgment-debtors" within the meaning of S. 2 cl. (10). They are "parties not being judgment-debtors" within the meaning of O. 21 R. 103. The order of the District Munsif dismissing the application for delivery of possession was one under O. 21 R. 103. Such an order is not appealable under O. 43 R. 1. The Subordinate Judge had no jurisdiction to entertain the appeal.

[*Seshagiri Iyer, J.*—Is it not possible that the legislature meant to give the aggrieved party a right to apply either under S. 47 or under O. 21, R. 100.]

I submit not. S. 47 is general whereas O. 21 R. 103 is specific. In such a case the general provision is governed by the specific rule. See *Nabin Dhandra Tripathi* v. *Prankrishna De* [1]. Moreover I submit that the proceedings in this case do not relate to the "execution, discharge or satisfaction of the decree," within S. 47 of the C.P. Code. See *Bhagwati* v. *Banwari Lal* [2], *Shasibushan Mukerji* v. *Radhanata Bose* [3]. The remedy of defendants 6 to 8 was by way

1. (1913) I. L. R. 41 Cal. 108.
2. (1908) I. L. R. 31 A. 82.
3. (1913) 20 C. L. J. 433.

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of suit under O. 21, R. 103. See *Jathavedan Nambudri* v. *Kuniu Achan* [1] *Kuppana Gavundan* v. *Kumara Gavundan* [2].

N. S. Rangasami Iyengar for *T. Narasimha Iyengar* for Respondents, was not called upon.

The Court delivered the following

Judgment:—It is argued first that the Lower Appellate Court's decision dissenting from that of the District Munsif in favour of the respondents, defendants, cannot be sustained, because no appeal lay to it. The question was between parties to the decree under execution, though against defendants no relief had been granted, and related to the propriety of a delivery. It, therefore, in our opinion was one for disposal under S. 47 of the Code of Civil Procedure *Jathavedhan Nambudri* v. *Kunchu Achan* [1] relied on by plaintiff, decided only that a dispute between such parties could be dealt with by enquiry under S. 331 of the Code of Civil Procedure and a subsequent suit, not that the procedure under S. 244 of the Code of Civil Procedure was not a legitimate alternative, the headnote to that effect being inaccurate. The question is in our opinion concluded by *Vibudha Priya Thirthaswamy* v. *Yusuf Sahib* [3] which was followed in *Sorabji Coorvarji* v. *Kala Raghunath* [4] and which is consistent with the course of decisions in this Presidency. S. 47, we must hold, is comprehensive and the fact that an alternative procedure by suit instead of appeal, is provided in certain circumstances cannot affect its character. We therefore disallow this contention.

Next it is argued that the District Munsif erred in allowing the defendants to include two items in their petition by an amendment which would ordinarily have been out of time. The objection was not taken in the Lower Appellate Court and we have not been provided with any materials for a consideration of the facts, on which the District Munsif proceeded. The objection fails.

On the merits the Lower Appellate Court's findings are clear and sufficient, and we have not been shown that the plaintiff was in any way prevented from adducing evidence before the District Munsif. The appeal against appellate order and the Civil Revision Petition fail and are dismissed with costs of the appeal only.

1. (1906) I. L. R. 30 M. 72 s.c. 16 M.L.J. 433.
2. (1909) I. L. R. 34 M. 450. s. c. 20 M L. J. 961.
3. (1905) I.L.R. 28 M. 380 : 15 M. L. J. 202.
4. (1911) I. L. R. 36 B. 156.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Sir John Wallis, Chief Justice and Mr. Justice Seshagiri Aiyar.

Sultan Adi Raja Ahmad Ali Raja of Arakal ... *Appellant** (*2nd Defendant*)

v.

Churia Kunhi Kannan and others ... *Respondents* (*Plaintiff, Defendants 3 to 7 and 9 to 18*).

Raja of Arakal *v.* Churia Kuhhi Kannan.

Malabar Law—Agreement of service—Contract to pay remuneration in the event of success in suit by Junior members—Suit compromised—Right of action—Legality of—Right of junior members to protect estate and be reimbursed expenses—Lenders for the purpose to juniors—Right to proceed against the family estate.

In a suit to recover from the defendants' Tarwad the remuneration which defendants 1 and 2 had when they were junior members promised, in the event of success, for plaintiff's services in connection with the contemplated suit against Government to protect the family estate but which he had failed to earn by reason of the first defendant's compromising the suit.

Held, that in the absence of proof that the suit was in the interests of the family and also that the agreement to pay the plaintiff the remuneration stipulated for was necessary, the action was unsustainable.

Per Chief Justice:—If the Karnavan for the time being is submitting to an infringement of the Taward's right of property it is competent to the next senior members to institute a suit to protect the rights of the family.

Quaere if an implied agreement to continue a suit to give the plaintiff his chance of earning the remuneration is not illegal.

Per Seshagiri Iyer, J: Though as a rule only the Karnavan can represent the Tarwad in transactions with strangers or pledge the family credit, when the karnavan is doing acts which seriously endanger the family property, the junior members have a right to take the steps necessary for the protection of the family interests and are entitled to reimburse themselves the expenses rightfully incurred in connection therewith and the persons that advance money for the purpose have similarly a right of recourse against the family estate though they run the risk of losing their money if it is found that the purpose of the loan was unnecessary or not beneficial to the family.

The case of ordinary co-owners distinguished.

Appeal against the decree of the Court of the Temporary Subordinate Judge of North Malabar in O. S. No. 4 of 1913.

The facts are fully set forth in the judgments.

J. L. Rosario for Appellant.

C. Madhavan Nair for Respondent.

Judgment:—*The Chief Justice*:—The only question in the case is whether the agreement sued on is binding on the Pandaram or family of the defendants. The question of ratification did not arise in the pleadings and the Subordinate Judge was not justified in making that one of the grounds of his decision. At

*Appeal No. 57 of 1914. 24th September 1915.

Raja of Arakal v. Churia Kunhi Kannan.

the time the agreement was entered into the defendants were in the position of Junior members of a tarwad who ordinarily have no power to enter into contracts binding on the tarwad. But though the karnavan has the exclusive right of management he does not, it is now settled, hold only for himself, but for himself and all the other members of the tarwad and therefore to some extent in a fiduciary capacity and it is competent, at any rate, to the members next in seniority not only to sue for his removal but also to sue for a declaration that an alienation made by him is not binding on the tarwad.

So, too, if the karnavan for the time being was submitting to an infringement by Government of the tarwad's right of property it was in my opinion competent for the defendants 1 to 3 as the next senior members of the tarwad to institute a suit such as O. S. No. 17 of 1906 in the District Court of North Malabar, the plaint in which is Exhibit U. Assuming for the moment that the circumstances justified the institution of the suit, and assuming, though no express authority has been cited for the proposition, that as incidental to the right to institute the suit the defendants 1 to 3 must be taken to have had authority to pledge the credit of the Tarwad for the purpose of raising the sums necessary to carry on the litigation, it must, I think, be shown in any case that it was necessary to pledge the credit of the tarwad in the way in which it was pledged in this particular case, and I am not satisfied that the plaintiff has shown this with regard to Exhibit A, the document sued on. Exhibit A recites that the plaintiff had been Dewan or Manager under karars or agreements with two previous karnavans and had become entitled under those karars to special remuneration in the event of his getting back the Laccadive Islands, that the then karanavan was entering into arrangements to relinquish the islands to government and to allow the Revenue Settlement to be introduced into the lands of the family—the inam land—contrary to the treaty with the East India Company of the year 1796. It is therefore stipulated that if the plaintiff succeeds in getting back the Laccadive Islands he is to be paid an amount equal to 25% of the average annual gross income of the islands, and if he succeeds in getting the settlement operations in the inam land cancelled he is to receive from the family a remuneration of Rs 8,000 and the necessary proceedings are to be taken at the cost of the defendants. The plaintiffs' case is that the

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defendants were bound to go on with the suit to the end to give him a chance of earning this Rs. 8,000 and that they broke this contract with him by compromising the case and thereby entitled him to sue on a *quantum meruit*. *Prickest* v. *Badger* [1], *Inchbald* v. *The Western Neilgherry Coffee Company* [2]. These were not cases in which the defendants impliedly bound themselves, according to the case for the plaintiff, to institute and go on with a law suit in order to give the plaintiff a chance of earning his remuneration; even if it were otherwise in the interests of the parties to come to a settlement and the legality of such an agreement may possibly be open to question. Apart altogether from this I am of opinion that the plaintiff has failed to show that the agreement was such as was binding on the family. The terms which were accepted by the 1st defendant after the institution of the suit were, as found by the Subordinate Judge the same as those which had been accepted by his predecessor who had died before they could be carried out. It is not shown that the settlement was one which it was desirable to question in the interests of the family and still less is it shown that it was necessary and desirable in the interests of the family to enter into an agreement of this kind stipulating for exorbitant remuneration to be paid to a so-called Law Agent—unlicensed practitioner—in addition to the costs which would be otherwise incurred in connection with the suit. Assuming that the Junior members of a tarwad have authority to bind the tarwad for the necessary costs of litigation of this nature, I think they had no authority to bind the family by the agreement Exhibit A. Relief is sought against the representative of the 1st defendant who is dead and against the second defendant personally. I would therefore reverse the decree and dismiss the suit with costs throughout. The memorandum of objections is dismissed with costs.

Seshagiri Aiyar J:—I entirely agree with my Lord.

The suit is for the recovery of the remuneration promised by the 1st and 2nd defendants to the plaintiff for assisting them in a litigation. The plaintiff was for some time the Dewan of the Arakkal Rajah of Cannanore. Negotiations were proceeding between the Rajah and the Government of Madras regarding the Laccadive Islands and the introduction of Revenue Settlement in

1. 1 C. B. N. S. page 296. 2. 17 C. B. N. S. page 733.

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the estate owned by the Swarupam. Some of the junior members of the family thought that the contemplated agreement with the Government would be detrimental to the interests of the Swarupam. The senior Anandarawan the 1st defendant, and the present 2nd defendant who were, entitled to succeed to the management of the Raj successively after the death of the then head of the Swarupam resolved upon instituting a suit against the Government for a declaration that the contemplated settlement operations were illegal. They sought the help of the plaintiff who was once a Deputy Collector in the British service and who was for some time the Dewan of the Raja. The plaintiff agreed to assist them on certain conditions. Exhibit A was executed on the 3rd of May 1906 to the plaintiff fixing the remuneration at Rs. 8,000, "If his attempts become fruitful." O. S. No. 17 of 1906 was instituted in the District Court of Tellicherry in October 1906 (Exhibit U), "for a declaration that the introduction of the Ryotwari Revenue Settlement into the Karar territory vested permanently in plaintiffs' house under the treaty of 1796 is illegal, unlawful and unauthorised and of no legal force and effect and consequently invalid and inoperative." The 1st defendant advanced the necessary funds for carrying on the litigation till June 1908. Meanwhile the then head of the family died; and the present 1st defendant succeeded to the management of the estate. In November 1908 a compromise was entered into by the 1st defendant with the Government, and she retired from the suit.

The plaintiff was not consulted with regard to this compromise, nor was the 2nd defendant a consenting party to it; when the suit came on for final hearing, the plaintiff did not appear as he was informed by the 1st defendant on the 2nd of December 1908 that he "need not do anything in connection with the suit No. 17 of 1906 now pending in the District Court of Tellicherry". (Ex. R—1). The suit was dismissed. The attempt of the 2nd defendant to resuscitate it in the District Court proved unsuccessful. An appeal was preferred to the High Court which was also rejected.

On these facts the plaintiff claims that as the performance of his part of the contract was rendered impossible by the conduct of the 1st defendant, he is entitled to the full remuneration stipulated in Exhibit A. No personal decree is prayed against the 2nd

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defendant, as there is no allegation that there was any breach of contract on his part. It is the case for the plaintiff that the 2nd defendant was not expected to provide any funds for the litigation, as he was not then in a position to do so. The 1st defendant died after the institution of the suit, and the present 2nd defendant has succeeded to the Raj. The relief claimed against him is that he should as the present manager of the Swarupam pay the amount claimed from the estate.

The Subordinate Judge gave a decree for Rs. 2,500 on the principle of *quantum meruit*. The 2nd defendant has appealed. There is also a memo of objections by the plaintiff. The principal question argued in appeal by Mr. Rozario is that the contract is not binding on the Swarupam. Turner, C. J. and Muthusami Aiyar. J. in pointing out the essential difference between the position of the junior members of a joint Hindu family and that of the Anandravans in a Malabar tarwad, say that the Karnavan has larger powers than the manager of a Hindu family in the management of the tarwad property. There is no doubt that under the Hindu Law as administered in this Presidency the manager alone can represent the family in transactions with strangers. In Mayne's Hindu Law edited by Sir C. Sankaran Nair, J. it is stated with reference to tarwad property that " it is vested in the head of the family not merely as agent or principal partner but almost as an absolute ruler." The original conception of the rights of the junior members that they have only " rights *out of* the property and not *in it*" requires qualification. The decision in *Varanakot Narayanan Nambudri* v. *Varanakot Narayanan Nambudri* [1], lays down that all the members of a tarwad have equal interests in the property and that the Karnavan has no greater beneficial interest in it. In *Moidin Kutti* v. *Krishnan* [2], Muthusami Aiyar. J, summarises the powers possessed by the junior members of the tarwad and characterises them as individual rights. These are certainly not rights of representation. The right to question alienations, to sue to recover property from trespassers, to claim maintenance and to succeed to the Karnavanship are all personal rights. Mr. Justice Kernan's view in the same case that the tarwad is a *quasi* corporation does not advance the matter any further.

Mr. Madavan Nair who appeared for the plaintiff suggested

1. (1880) I. L. R. 2 M. 328. 2. (1887) I. L. R. 10 M, 322.

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that under the general principles of the law of contracts, 1st and 2nd defendants were entitled to represent the tarwad, as their object was to avert a danger which threatened the tarwad. He contended that the analogy of co-owners of property was more applicable to the members of a tarwad. Looking at the transaction as one entered into by two co-owners of property with a view to benefit the entire body of owners, there is no ground for holding that it would bind the others: In Freeman on co-tenancy, the rule of law regarding co-owners is thus stated: "As a general rule, no co-tenant has, by virtue of the relation of co-tenancy, any authority, to bind his companion in interest by any contract, whether relating to the joint property or otherwise." In another place it is stated: "A pledge of the common property made by one of the co-tenants has no effect on the rights of the others, except to confer on the pledgee the right to retain possession to the extent of the pledger's interest, and no further." In a Malabar tarwad, unlike in a joint Hindu family, there can be no right to proceed against the share of the alienating member. It is, therefore, clear that under the law which governs the right of co-owners, any two of them is not competent to pledge the credit of the others.

But the position of the members of a tarwad differs in many respects from that of co-tenants. The decided cases already referred to lay down that the karnavan is alone competent to represent the tarwad in transactions with strangers. I think this rule requires some qualification. When the tarwad is in its normal state, the karnavan alone is competent to pledge the tarwad credit. But where the acts of the karnavan are such as to seriously endanger tarwad property, it seems to me that it would be legitimate to give the junior members power to act on behalf of the tarwad. These members cannot claim their separate shares by partition as in a joint Hindu family. The relationship of the karnavan towards the Junior members is more like that of a trustee and *cestui qui trust* or of guardian and wards. The decisions have recognised their right to sue to set aside improper alienations. As a corollary to this position, I think they should have the right of reimbursing themselves the expenses rightly incurred by them in protecting tarwad property. Outsiders who lend money to Anandravans for the avowed object of preserving tarwad property run the risk of losing their money if it is

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found that the purpose of the loan was unnecessary or not beneficial to the tarwad. But when it is proved that the money was advanced and utilised for protecting the property from malversation or mismanagement the lender should have a claim on the tarwad for the loan.

But in this case I am not satisfied on the evidence on record that the plaintiff has established his right against the tarwad. There was no necessity for promising a large remuneration for a law agent. A recognition of such a right will not be in the interests of the Swarupam. The payment of authorised legal practitioners and the other expenses incurred in filing and conducting a suit would stand on a different footing. Further the plaintiff has not proved that the apprehended danger was of such a character that the intervention of defendants Nos. 1 and 2 was for the benefit of the Swarupam Although, therefore, I am not prepared to accept in its entirety the contention put forward by the learned Vakil for the appellant that the contract was beyond the powers of the 1st and 2nd defendants under all circumstances, I do not think that in the present case it has been shown that the defendants acted in the best interests of the Swarupam.

Another contention of the learned counsel for the Respondent was that as the 1st defendant after becoming the Rajah continued the suit and made remittances, she must be deemed to have ratified the contract as karnavan and it is, therefore, binding on the Swarupam. No issue on the question of ratification has been raised and there are no materials for deciding that the 1st defendant with knowledge of the obligations she was incurring as head of the family ratified Exhibit A.

In the view that I have taken, the question of *quantum meruit* does not arise. In the result, the appeal must be allowed and the suit dismissed with costs in both the courts. The memo of objections will also be dismissed with costs.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Sir John Wallis, Chief Justice, and Mr. Justice Srinivasa Aiyangar.

Sree Rajah Vatsavaya Venkata Simhadri Jagapatiraju Bahadur Garu (dead), and another. *Appellants* (Plaintiff and his legal re-presentatives.)*

v.

Sree Rajah Thyada Pusapati Rudra Sri Lakshmi Nrusimha Roopa Sadrusannamarad Dugaraju Dakshina Kavata Dugaraju Bahadur Garu, and others. *Respondents (Defendants).*

Sree Rajah Simhadri Jagapatiraju *v.* Sree Rajah Dakshina Kavata Dugaraju.

Contract Act Ss 69. 70—Payment by part owner of estate of whole estate, to save estate—Right against other co-owners—No personal liability—Charge on their shares—Liability in proportion to their shares—" Person interested in the payment of money," meaning of.

Where the plaintiff and the 6th defendant were part owners by court auction purchase each of a particular share of an estate of which the 1st defendant was the registered proprietor and owner of the remaining share, and the plaintiff paid the whole of the revenue due on the estate to save the property when it was attached for arrears of revenue, and the plaintiff sued to recover the amount so paid from the 1st and 6th defendants, the property purchased by the 6th defendant being wholly outside the jurisdiction of the Court.

Held, that the plaintiff by paying the whole of the revenue only got a charge on the holdings of his co-sharers who were not themselves personally liable to Government to an amount proportionate to their shares, and was not entitled to get a personal decree against the co-sharers.

That S. 70 of the Contract Act did not apply to the plaintiff's case.

The portion of the estate purchased by the 6th defendant being situated in the Agency tracts, outside the jurisdiction of the court, the court had no jurisdiction to enforce a charge over the portion of the estate purchased by the 6th defendant, and the plaintiff must be left to enforce his charge in the Agency Courts.

If the purchases of the plaintiff and the 6th defendant were in a private sale, under S. 55 of the Transfer of Property Act, they would each be bound to pay the proportionate share of the Government revenue. The fact that the purchase was in a court auction sale did not make any difference.

As against the 1st defendant, the plaintiff could only get a decree for the share of the revenue proportionate to the land held by him.

S. 69 of the Contract Act did not apply to the case, as the person who is interested in the payment mentioned in that section must be a person who as between himself and the defendant is not bound to pay, though the defendant may be under an obligation to pay a third party. In other words, " the person interested in the payment of money " in S. 69, must be one who is not himself bound to pay the whole or any portion of the amount.

Appeal against the decree of the Court of the Temporary Subordinate Judge of Vizagapatam in Original Suit No. 46 of 1908.

* A. No 98 of 1911. 15th September 1915.

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The facts are shortly these:—The plaintiff who had purchased some of the villages of the Pachipenta estate in execution of a decree held by the Maharaja of Bobbili against the owner of the Pachipenta estate brought the present suit to recover a sum of Rs. 6,125-0-4 and interest thereon, the said sum being the arrears of revenue due on the whole estate for which the estate had been attached by the Deputy Collector of Salur and which the plaintiff paid to prevent the estate being sold for arrears of revenue. The defendants 1 to 5 formed a joint family together owning the estate remaining after the shares sold in execution of decrees against the holder of the Estate. The 1st defendant was at the date of arrears, the registered proprietor of the whole estate.

The 6th defendant who was subsequently added as a supplemental defendant had purchased the Agency portion of the estate in court auction held by the agent to the Governor, Vizagapatam. He was resident in Jeypore (Agency tracts).

The various defences of the defendants are immaterial for the purpose of the report except that of the 6th defendant, who pleaded *inter alia* that he was resident in Jeypore (Agency) and the portion of the Pachipenta Zamindari purchased by him was entirely in the Agency tracts and the Court had consequently no jurisdiction so far as he and the property were concerned.

The Temporary Subordinate Judge of Vizagapatam passed a decree against defendants 1 to 5 for Rs. 1,250-9-11 being the proportionate amount of the revenue allotted to the share held by them, and dismissed the suit against the 6th defendant upholding his objection to the jurisdiction of the court. The plaintiff appealed to the High Court against all the defendants claiming the whole amount.

B. N. Sarma and Appa Rao (with him) for the Appellant.

V. Ramesam and *S. Srinivasa Aiyangar* for the Respondents.

The Court delivered the following

Srinivasa Aiyangar, J.

Judgments:—*Srinivasa Aiyangar J*:—Two points are raised in this appeal, first as to the liability of the 6th defendant, second as to the amount recoverable from the 1st defendant, the registered holder.

So far as the 6th defendant is concerned it is clear that the plaintiff cannot recover anything personally from him as he was under no personal obligation to pay the proportionate revenue

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to the Government. It is now settled that the only person who is personally bound to pay the revenue to Government is the registered holder, who is called the defaulter in the Revenue Recovery Act, and that co-owners or co-sharers who are not also registered holders are not under any such obligation, though the Government revenue may be a charge on the lands in their holding. *Subramania Chetty* v. *Mahalingasami Sivan* [1]. Payment of the revenue by the plaintiff could not give him a larger or higher right than what the Government had. See Ghose on Mortgages p. 371; Freeman on Co-tenancy pp. 254 and 349. On this principle this Court has held in *Paruykyi* v. *Pakram Haji* [2], and *Narain Pai* v. *Appu* [3], that a person who pays the whole revenue to the Government under circumstances similar to the present case is not entitled to a personal decree against the co-owners or co-sharers who were not under a personal obligation to pay to the Government. The observations of Bhashyam Ayyangar, J. in *Rajah of Vizianagram* v. *Rajah Setrucherla Somasekhararaz* [4], were based on the assumption that all the co-owners or co-sharers were liable personally to pay to the Government. Nor do we think that section 70 of the Contract Act has any application to the present case. The case of *Gajapathi Kistna Chendra Deo* v. *Srinivasa Charlu* [5], on which Mr. Sarma relied has not been followed in *Raja of Pittapuram* v. *Secretary of State* [6], in which all the previous cases were reviewed by Spencer, J., and this case was followed in *Narain Pai* v. *Appu* [3], by Sadasiva Aiyar, J. who was himself a party to the decision in *Gajapathi Kistna Chendra Deo* v. *Srinivasa Charlu* [5]. The case *Yogambal Boyee Ammani Ammal* v. *Naina Pillai Markayar* [7], is also to the same affect. If the 6th defendant had been personally liable to pay, the Sub-Court of Vizagapatam would have jurisdiction to pass a money decree, though the 6th defendant was residing in the Agency Tracts, as the cause of action arose at least in part within the jurisdiction of the Vizagapatam Sub-Court; but that Court has no jurisdiction to enforce a charge over the portion of the estate purchased by the 6th defendant as it is situated in the Agency Tracts, and the plaintiff must be left to enforce his charge in the Agency Courts. We therefore confirm the decree of the Lower Court as regards the 6th defendant.

1. (1909) I.L.R. 33 M. 41. 2. C. M. A. No. 110 of 1911, 15 I. C. 262.
3. (1914) S. A. No. 1197 of 1913, 28 I. C. 456.
4. (1902) I. L. R. 26 M. at p. 713. 5. (1913) 25 M. L. J. p. 433
6. (1914) 16 M. L. T. p. 375. 7. (1909) I. L. R. 33 M. p. 15. s.c. 19 M.L.J. 489.

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The next question which alone admits of any doubt is the amount, which the plaintiff is entitled to recover from the first defendant, the registered holder. The plaintiff, the first defendant and the 6th defendant are each in possession of portions of the estate. The Government revenue paid by the plaintiff accrued due after the purchase by the plaintiff and the 6th defendant of portions of the property in execution of a mortgage decree. If it was a case of a private sale under S. 55 of the Transfer of Property Act, the plaintiff and the 6th defendant would each be bound to pay the proportionate share of the Government revenue due on the lands in their possession; the fact that the purchase was made in a Court-sale does not make any difference. The position therefore is this: there was a charge on the whole estate in favour of the Government, and the registered holder, the 1st defendant, was also personally liable to pay the amount of the charge to the Government. (We are assuming that the statutory liability of the registered holder is a personal liability). The case is analogous to that of a mortgagor who had covenanted to pay the mortgage money and who afterwards sells portions of the mortgaged property to several persons subject to the mortgage. As between the mortgagor and his vendees, the mortgagor would be liable in proportion to the value of the property in his hands, while his vendees would be liable in proportion to the value of the property in their hands. This of course would not affect the right of the mortgagee to enforce the personal covenant against, the mortgagor or the charge against any portion of the mortgaged property. If in such a case the whole amount is collected from the mortgagor on his personal liability or by the sale of the property in the hands of any one of the owners, the person who so paid the money or out of whose property the mortgage amount was realised would be entitled to contribution from the property of the other owners under S. 82 of the Transfer of Property Act. The mortgaged property is considered the primary fund for payment of the mortgage debt. (Jones on Mortgages S. 736 and S. 740; also see *Palmer* v. *Hendrie* [1].) If therefore the present plaintiff had asked for contribution out of the properties, he could not have recovered more than the amount payable by the 1st defendant, in proportion to the value of the property in his hands. For example if the plaintiff was the purchaser of a ⅓rd share, 6th defendant another ⅓rd, the 1st defendant

1. 27 Beavan p. 349.

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remaining in possession of the other third, whoever paid the whole of the charge whether plaintiff or the 6th defendant or the 1st defendant, would be entitled to recover ⅓rd from each of the remaining two as a charge on the property. Does the fact that the plaintiff sues under section 69 of the Contract Act to recover the money personally from the registered holder make any difference as regards the amount claimable from him. Reading the terms of S. 69 literally, in the case supposed, the plaintiff, it may be contended, would be entitled to recover the whole amount and not merely ⅔rds or ⅓rd personally from the registered holder, for the 1st defendant was the person who in law was bound to pay the revenue; the plaintiff of course was interested in the payment *i. e.*, he was not a volunteer. That, I think, would be manifestly absurd, for the property in the hands of the plaintiff is itself liable to pay ⅓rd of the Government revenue, and it is this liability on his part that gives him a right to make the payment at all to the Government, so as to enable him to recover back from the co-owners the share of the revenue which they personally were bound to pay or for which the property in their hands were liable a simple illustra ion will make this matter clear. A mortgages certain lands to B and sells the property subject to the mortgage to C. Supposing B sues C on the mortgage, and C to save the property pays the mortgagee; could C recover the money from A, he being the person who under law was bound to pay within the meaning of Section 69 ? clearly not; for as between A and C, C is the person who is bound to discharge the debt, though so far as B the mortgagee is concerned there is no novation of the liabilty of A; the position of A in such cases is said to be analogous to that of a surety, C being the principal debtor. It is the ultimate liability that determines the right to recover the amount paid to discharge the original liability. It is possible to contend in the case above said that C is entitled to recover from A personally the amount of the mortgage debt, but that A in his turn would be entitled to a charge upon the mortgaged property for the sum which he paid to C and recover as much as he can from the mortgaged property, which amount may conceivably be less than the amount which he paid; this would be untenable, because, the purchaser of the property subject to the mortgage would then be entitled indirectly to recover back the amount paid

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by him for the sale of the equity of redemption. To put the converse case, if A had been sued by the mortgagee personally and had been obliged to pay B, he certainly would be entitled to call on C to pay back the money which he paid. In an English conveyance on sale of the equity of redemption a covenant would be implied on the part of the vendee to indemnify the vendor from all the consequences of non-payment of the mortgage amount by the vendee. Under the Transfer of Property Act, Section 55, though there is no implied covenant of indemnity the same result would follow as the statute makes it obligatory on the part of the vendee to discharge the mortgage as between him and his vendor though the liability of the vendor-mortgagor to his mortgagee is not affected. It is clear therefore that the person who is interested in the payment mentioned in Section 69 must be a person who as between himself and the defendant was not bound to pay though the defendant may be under an obligation to pay to a third party. (*See Mangalathammal* v. *Narayanaswami Aiyar* [1] and *Manindra Chandra Nandy* v. *Jamahir Kumari* [2]). Whether the basis of section 69 is the Common Law action of "money paid at the defendant's request" or the equitable doctrine of subrogation does not much matter as the plaintiff can in either case recover only from the person ultimately liable. *See Moule* v. *Garrett* [3], per Cockburn C. J citing Leake, Sheldon on Subrogation page 15, Section 11). In this case, if the plaintiff and the 1st defendant were the only two persons who had an interest in the property, and if the plaintiff had paid the whole of the Government revenue he could not have recovered more than the share payable on account of the property in the hands of the defendant. Is the plaintiff also entitled to recover from the 1st defendant the proportionate share of the revenue payable on account of the properties in the hands of 6th defendant, because the plaintiff is not the person liable to pay that sum? If the plaintiff is allowed to recover from the 1st defendant the amount payable both on account of the properties in his hands and in the hands of the 6th defendant, unless the first defendant is in his turn subrogated to the rights of the plaintiff (which is more than doubtful), the first defendant would have been compelled to pay the amount really payable by the 6th defendant; that, I think, would be unfair. The present

1. (1907) 17 M. L. J. 250. 2. (1904) I. L. R 32 C. 643.
3. L. R. 7 Exch 101 at 109.

suit is a suit for contribution and it was of course necessary to make all persons who are liable to contribute, whether personally or out of their properties, parties, in order to fix the proportionate amount which each person was ultimately bound to pay. If section 69 applies to a suit for contribution it may be that no effective relief could be given against all the parties so as to dispose off, of all matters in controversy and avoid multiplicity of suits. In *Futteh Ali* v. *Gunganath Roy* [1], it was doubted whether a suit for contribution comes within the scope of section 69.

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"The person interested in the payment of money" must, we think, be a person who is not himself bound to pay *the whole or any portion of the amount*. It is to be noted, that there are express provisions in the Contract Act for contribution in the cases of joint promisers and co-sureties. (Section 43, Clause 2 and Sections 146 and 147). We are therefore inclined to hold that S. 69 does not apply to a suit for contribution at all. The result is the appeal is dismissed with costs.

The Chief Justice:—I agree.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.
[FULL BENCH.]

Present :—Sir John Wallis, Chief Justice, Mr. Justice Sadasiva Aiyar and Mr. Justice Srinivasa Aiyangar.

Vyapuri and Raman ... *Appellants** (*Defendants Nos. 1 and 2.*)

v.

Sonamma Boi Ammani ... *Respondent* (*Plaintiff*).

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Limitation Act, Art. 132, 144—*Adverse possession—Mortgagor—Simple mortgage—Dispossession of mortgagor after mortgage—Not adverse to mortgagee.*

The possession of a trespasser dispossessing the mortgagor (the mortgage being simple) is not adverse to the mortgagee and does not affect his rights.

Parthasarathy Naicken v *Lakshmana Naicken* [2] followed. *Ramasami Chetti* v. *Ponna Padayachi* [3] overruled.

Second Appeal against the decree of the Court of the Subordinate Judge of Tanjore in Appeal Suit No. 223 of 1911, preferred against the decree of the Court of the District Munsif of Tiruvadi in Original Suit No. 131 of 1910.

This Second Appeal came on for hearing on Thursday, the 20th day of August 1914, before (Oldfield and Seshagiri Aiyar, JJ.)

* S. A. No. 19 of 1913. 31st August 1915.

1. (1881) I.L.R. 8 C. 118. 2. (1910) I.L.R. 35 M. 231=21 M.L.J. 467.
3. (1910) I. L. R. 36 M. 97 ; s.c. 21 M.L.J. 397.

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The Court made the following

Order :—The learned Subordinate Judge has dealt with the case in the alternative with reference to either of the possible views of the facts. We think it necessary to have his conclusion as to them definitely expressed and therefore call on him for a finding on the following issue :—

"Was 1st defendant admitted by Soloman Thenkondan, as a porakudi, and, if so, when ?"

The finding should be submitted within six weeks from this date; and the parties will be at liberty to file objections to the finding within seven days after notice of the return of the same shall have been posted up in this Court.

[In compliance with the above order the Subordinate Judge of Tanjore submitted his finding in favour of the 1st defendant.]

This Second Appeal came on for hearing on Wednesday, the 28th day of April 1915, after the return of the finding of the Lower Appellate Court upon the issue referred by this Court for trial before (Oldfield and Seshagiri Aiyar, JJ.)

The Court made the following

ORDER OF REFERENCE TO A FULL BENCH :—

We accept the finding which is one of fact.

The question for decision is then whether the 1st and 2nd defendants have acquired an absolute title by prescription, against plaintiff, purchaser at court auction of the right, title and interest of the mortgagor of the property. The plaintiff is now suing to recover possession. The 1st and 2nd defendants contend that their prescription conferred on them full title, including both the mortgagor's and the mortgagee's interests. The facts as alleged or found are that the mortgage was in 1878; the suit on it was in 1900; plaintiff's title originated in her purchase on 31—10—06; the present suit was brought in 1910; and the defendant's adverse possession began twenty years before suit, that is in 1890. The effect of prescription against a mortgagee under a simple mortgage has been dealt with by two Benches of this Court in *Parthasarathy Naicken* v. *Lakshmana Naicker*, [1] and *Ramasami Chetti* v. *Ponna Padayachi*, [2] diametrically opposite conclusions being reached. The matter was the subject of reference to a Full Bench in *Peria Aiya Ambalam* v. *Shunmugasundaram*, [3] but it was found unne-

1. (1911) I. L. R. 35 M. 231 : 21 M. L. J. 467.

2. (1910) I. L. R. 36 M. 97 : 21 M. L. J. 397. 3. (1913) 26 M. L. J. 140.

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cessary to deal with it. In this conflict of authority we refer to a Full Bench the question "Whether the possession of a trespasser who has dispossessed a mortgagor, the mortgage being simple, is adverse to the simple mortgagee."

This Second Appeal came on for hearing as per above order on Wednesday, the 4th day of August 1915.

[The facts appear from the order of reference to the Full Bench.]

G. S. Ramachandra Aiyar for the Appellants : The existence of a simple mortgage does not prevent the vesting of title by prescription in the person in possession of the property. A simple mortgage is merely a debt secured by immovable property. The mortgagee's right is to sell the interest of the mortgagor in the land. The mortgage decree does not bind persons who do not derive their title from the mortgagor but claim adversely to him, and have, acquired a complete title by the statute. The mortgagee's right to the security subsists only so long as the mortgagor's right to the property subsists. The effect of S. 28 of the Limitation Act, in this case, is to determine for good the ownership of the mortgagor. It would destroy the mortgagee's right also, for there will be nothing on which the security can operate. This was so under the Roman Law. See Hunter's 'Roman Law' 2nd Edn. 447, Salkowski's 'Roman Law' by Whitfield 503. Possession adverse to the mortgagor is adverse to the mortgagee though the latter is not in actual possession. See *Ammu* v. *Ramakrishna Sastri* [1] *Prannath Roy Chowdhury* v. *Rookea Begam* [2] *Sheoumber Sahoo* v. *Bhowandeen Kulwar* [3] *Roy Karan Singh* v. *Bakar Ali Khan* [4]. The last case is exactly in point. The same view has been adopted in *Nand Kumar Dobey* v. *Ajodhya Sahu* [5] *Bireshwar Samanta* v. *Priya Sakhi Debi* [6] *Ramasami Chetti* v. *Ponna Padayachi* [7] and *Nallamutu Pillai* v. *Betha Naickan* [8]. The mortgagee is not without his remedy against the trespasser. He can protect his interest by proper proceedings. He can sue for money. Or he can sue for possession to be given to the mortgagor as was suggested in

1. (1879) I. L. R. 2 M. 226 at 229.
2. (1859) 7 M. I. A. 323 at 355.
3. (1870) 2 N. W. P. H. C. R. 223.
4. (1882) I. L. R. 5 A. 1. (P. C.)
5. (1911) 14 C. L. J. 292.
6. (1915) 28 I. C. 917.
7. (1910) I. L. R. 36 M 97=21 M. L. J. 397.
8. (1899) I.L.R. 23 M. 37 ; s. c. 9 M. L. J. 258.

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Ambalavana Chetty v. *Singaravelu Udayar* [1], *Peria Aiya Ambalam* v. *Shanmuga Sundaram* [2]. It is immaterial if the mortgagee is not in possession or not entitled to possession. Notice of the trespass is sufficient. See *Peria Aiya Ambalam* v. *Shanmuga Sundaram* [2]. The law would be the same in England but for 7 William IV and 1 Vic. C. 28. There is no such analogous provision in India. The decisions in *Parthasarathy* v. *Lakshmana* [3], and *Nandan Singh* v. *Jamman* [4], are opposed to the Full Bench decision in *Peria Aiya Ambalam* v. *Shanmuga Sundaram* [2].

C. Padmanabha Aiyangar for *A. K. Madhava Rao* for the Respondent: A mortgage is the transfer of an interest in immovable property S. 58 of the Transfer of Property Act. The interest in immovable property that is affected by adverse possession is the interest which the person entitled to immediate possession at the time adverse possession began, had at the time. *Bejoy Chunder Banerjee* v. *Kally Prosonno Mookerjee* [5], *Parthasarathy* v. *Lakshmana* [3]. Tested by this principle, the possession of a trespasser of the mortgaged property cannot be adverse to a simple mortgagee. A mere incorporeal right cannot be the subject of adverse enjoyment. *Venkataramanachari* v. *Thirunaranachari* [6], *Lakshminarayana Aiyar* v. *Ulagammal* [7], *Nisbett and Pott's Contract, In re* [8]. I submit that *Parthasarathy* v. *Lakskmana* [3], and *Nandan Singh* v. *Jamman* [4], are correctly decided.

The cases cited by the other side except *Ramaswami Chetti* v. *Ponna Padayachi* [9] are all cases where the trespass commenced before the mortgage or where the mortgagee was entitled to possession either at the date of trespass or subsequently. The right of the mortgagee cannot be extinguished by any act on the part of a third person behind his back. If the mortgagee purchases the mortgaged property in execution of his decree, his right to possession accrues on the date of purchase. *Aimdaar Mandal* v. *Makhan Lal Day* [10]. Till then he has no right to possession. Take the case of a simple mortgage with a term of 20 years. The mortgagee cannot sue either for the money or for possession till the expiry of the term. If the contention of the other side is to hold

1. (1912) M. W. N. 669.
2. (1913) 26 M. L. J. 140.
3. (1910) I.L.R. 35 M. 231=21 M.L.J 467.
4. (1912) I. L. R. 36 A. 640.
5. (1879) I. L. R. 4 C. 327.
6. (1914) 2 L. W. 212.
7. (1914) 28 M. L. J. 256 at 258.
8. (1906) L. R. 1 Ch. 386 at 407.
9. (1910) I. L. R. 36 M. 97=21 M.L.J. 397.
10. (1906) I. L. R. 33 C. 1015.

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good, his right against the property might become barred before the expiry of the 20 years, if a trespasser steps on the property after the mortgage and acquires a good title against the morgagor. On principle and authority the contention of the other side is unsustainable. *Parthasarathy* v. *Lakshmana* [1].

The Court expressed the following

OPINION :—*The Chief Justice* :—I should have been prepared to adopt the judgment of Munro J. in *Parthasarathy Naicken* v. *Lakshmana Naicker* [1], which was followed in Allahabad in *Nandan Singh* v. *Jumman* [2], and approved by the Full Bench of that Court in *Raj Nath* v. *Narain Das* [3], and was itself in accordance with the Calcutta decision in *Aimadar Mandal* v. *Makhan Lal Dey* [4], if it were not this last decision has been questioned in *Nand Kumar Dobey* v. *Ajodhya Sahu* [5], and not followed in *Bireshwar Samanta* v. *Priya Sakhi Dbei* [6], where the opposite view taken by Abdur Rahim and Ayling JJ. in an earlier case in this Court in *Ramasami Chetti* v. *Ponna Padayachi* [7] was accepted as being in accordance with the decisions of the Privy Council in *Prannath Roy Chowdri* v. *Rookea Begum* [8], and *Karan Singh* v. *Bakar Ali Khan* [9]. Before dealing with these decisions I may say we have not been referred to any English authority for the position that a mortgagee whose right to possession has not accrued may be debarred from suing by possession adverse to his mortgagor commencing after the date of the mortgage. Under the Statute of 21 Jac. 1. C. 16 what was barred was the right of entry or right of taking possession, and time did not begin to run until that right accrued, and then only when the possession of the occupier was adverse. So too under sections 2 and 3 of the English Real Property Limitation Act 1883 in suits by persons entitled to possession under an instrument, time only begins to run from the date when the right to possession accrues. It is well settled that these are the sections applicable to a mortgagee *Doe d. Roylance* v. *Lightfoot* [10] though there are other provisions giving a fresh starting point from the date of part payment. Under an ordinary English mortgage the mortgagee was

1. (1910) I. L. R. 35 M. 231. 2. (1912) I. L. R. 34 All. 640.
3. (1914) I. L. R. 36 All. 567. 4. (1906) I. L. R. 33 C. 1015.
5. (1911) 14 C.L.J. 292 at p. 298 6. (1915) 28 I. C. 917.
7. (1910) I. L. R. 36 M. 97. 8. (1859) 7 M. I. A. 323 at p. 331.
9. (1882) I. L R. 5 All. 1 s.c. L. R. 9 I. A. 99.
10. (1841) 8 M. & W. 553 ; s. c. 11 L. J. Exch. 151.

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entitled to possession at any time and could bring ejectment against the mortgagor who only held at his pleasure *Keech* v. *Hall* 1, but the possession so taken by him would be the onerous possession of a mortgagee accountable for the profits to the mortgagor, and it was held that on foreclosure a fresh right of action arises for possession as owner *Pugh* v. *Heath* 2. Under the English statutes it seems to me to be immaterial whether possession commencing after the date of the mortgage was or was not adverse to the mortgagor and the recent decision *in re Nisbett and Potts' Contract* 3, is in accordance with this view.

In Bengal and Madras, outside the Presidency Towns where the Act of James I was received, time under the Regulations ran from the accrual of the plaintiff's cause of action, and this in the case of immovable property was held to accrue when the possession of the occupier became adverse.

In *Prannath Roy Chowdry* v. *Rookea Begum* 4, which was governed by the Bengal Regulations, the main contention raised by Mr. Roundell Palmer for the appellant was that a suit for foreclosure instituted by his clients more than twelve years after the mortgage debt had become payable was not barred under the Bengal Limitation Regulations, because the disputes and litigation going on between the heirs of the mortgagor and third parties claiming as purchasers were a good cause for not suing earlier. In addition, however, to this contention, which was upheld by their Lordships who disposed of the suit, he argued further that there was no rule of law which creates an absolute possessory title in a twelve years undisturbed possession even if that had been such. On the other side it was not contended that the respondent who claimed under an alleged purchase from the mortgagor had been holding adversely to the mortgagee. The contention was that they had purchased subject to the mortgage and were entitled to redeem. Their Lordships' judgment must be read with reference to these contentions. The case was one of a mortgage by conditional sale and their Lordships observed that if the mortgage deed had been allowed to take effect according to its tenor possession might be considered to have become adverse to the mortgagee-purchaser from the completion of the title, or as I understand it, from the time when the mortgagee was to become owner under the terms

1. (1778) I. Dougl 21, I. Sm. L. C 511. 2. (1882) L. R. 7 A. C. 235.
3. (1906) I. Ch. 386. 4. (1859) 7 M. I. A. 323 at p. 33.

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of the deed and entitled to possession as such. As however under the Bengal Regulations the conditional sale was to be treated as a mortgage, they held that the possession of persons in the position of the respondents whose case was that they had acquired and held the property subject to the mortgage was not, any more than in England, inconsistent with the mortgagee's title, or their possession adverse to the mortgagee. As regards the defences with which a mortgagee suing for possession after foreclosure might be met by occupants other than the mortgagor, their Lordships say that he might be met "by proof of a prior or a superior title, or by proof of want of title in himself, or that he has not perfected his title to possession". By these last words I understand that the mortgagee must show that his own title to possession has accrued. Their Lordships certainly did not say that a mortgagee suing in the circumstances stated might be met by proof of possession adverse to his mortgagor commencing subsequently to the mortgage at a time when he himself had no right to possession against the mortgagor or any one else.

Under the Indian Limitation Act of 1859, as under the English Real Property Limitation Act, 1833, there was no special provision for suits by mortgagees, but as regards suits to recover the mortgaged property they clearly come within the terms of S. I Article 12 which allowed 12 years from the date of the cause of action for suits to recover immovable property or any interest therein not otherwise provided for. Even suits by a mortgagee to enforce his rights by sale were held by this Court to come within this Section in *Chetti Goundan* v. *Sundram Pillai* [1], and the decisions of the Full Bench in Calcutta in *Surwan Hossein* v. *Shahazadah Golam Mahomed* [2], and of the Privy Council in *Juneswar Dass* v. *Mahabeer Singh* [3], were to the same effect. Dealing with a suit by a mortgagee governed by this section in *Brojanath Koondoo Chowdry* v. *Khelut Chunder Ghose* [4], their Lordships observed that " where both things occur, possession by such a holder " (a holder claiming adversely) "and the right of entry under the mortgage deed more than twelve years old, it was impossible to say that such a possession is not protected by the law of limitation". In the case just mentioned the mortgagee himself had the right to take possession and had failed to exercise it for twelve years.

1. (1864) 2 M. H. C. R. 51.
2. (1868) 9 W. R. 170.
3. (1875) I. L. R. 1 C. 163.
4. (1872) 14 M. I. A. 144.

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Under the Act of 1859 it was no doubt held in Calcutta by Bayley and Jackson JJ., in *Ram Coomar Sein*, v. *Prosunno Coomar Sein* [1], that in a suit by a mortgagee for possession after foreclosure he might be met by proof of possession for twelve years adverse to the mortgagor, and the decision of their Lordships in *Prannath Roy Chowdry* v. *Rookea Begum* [2], was cited in support of this view, but, as I have endeavoured to show, their Lordships laid down no such proposition in that case, and indeed their observations point the other way. Further I do not see how *Ram Coomar Sein* v. *Prosunno Coomar Sein* [1], is to be reconciled with the subsequent decision of the House of Lords in *Pugh* v. *Heath* [3] already referred to. As regards *Sheoumber Sahoo* v. *Bhowaneedeen Kulwar* [4] a decision of the year 1870 which was also cited, it is stated in the very brief judgment that the possession of the third party was adverse to the mortgagee but the facts are not set out. If this case proceeded on the authority of *Ram Coomar Sein* v. *Prosunno Coomar Sein* [1] it is open to the same observations. *Karan Singh* v. *Bakar Ali Khan*, [5] the case on which most reliance is placed in *Ramasawmi Chetty* v. *Ponna Padayachi* [6] and *Bireshwar Samanta* v. *Priya Sakhi Debi* [7] was decided under the Limitation Act of 1871 which by Article 132 in suits for money charged on immovable property allowed twelve years from the date of the money being due, and by Article 135 in suits instituted in a Court not established by Royal Charter by a mortgagee for possession of immovable property mortgaged allowed twelve years from the time when the mortgagee was first entitled to possession, and by Article 145 in suits for possession of immovable property or any interest therein not otherwise specially provided for "allowed twelve years from the time when the possession of the defendant or of some person through whom he claims became adverse to the mortgagee." The judgments of the Allahabad High Court before whom the case of *Karan Singh* v. *Bakar Ali Khan* [5] came on appeal and letters patent appeal have not been reported but the learned Judges who made the reference to the Full Bench in *Raj Nath* v. *Narain Das* [8], state that they examined the records of this case and that the five Judges of the

1. (1864) I. W. R. 375.
2. (1859) 7 M. 1. A. at p. 331.
3. (1882) 7 A. C. 235.
4. (1870) 2 N. W. P. H. C. R. 223.
5. (1883) I. L. R. 5 All. 1.
6. (1915) I. L. R. 36 M. 97.
7. (1915) 28 I. C. 917.
8. (1914) I. L. R. 36 All. 557.

Allahabad Court before whom the case came seem to have been of opinion that twelve years adverse possession would bar a suit in a simple mortgage, and seem to have attached no importance to the fact that the mortgagee had not been entitled to possession of the property; and that they also seem to have thought that Article 145 and not Article 132 was the article applicable. The language of Article 145 as to the class of suits it covers is much the same as that of Section I Article 12 of the Act of 1859, and according to the decisions already referred was wide enough to cover a suit for sale; but this was only the residuary article, and, if the claims of Article 132 had been urged at the bar they must have been dealt with in the judgment. The contest in the High Court was as to whether the possession by the Collector had been adverse to the plaintiffs. The majority held that it had not and their Lordships agreeing with them on this point dismissed the suit without calling on the other side. The only other point taken by the appellant was that it was for the plaintiff to show that he had been in possession within twelve years. As to this their Lordships observed in effect that this was so under S. I Article 12 of the Act of 1859 under which time ran from the date of the cause of action, but not so under Article 145 of the Act of 1871 under which the time ran from the date when the possession became adverse to the plaintiff. Article 145 was apparently the article relied on for the appellant, and I do not think this observation can be taken as amounting to a decision as to the inapplicability of Article 132. as the point was not taken and the respondent who was not called on had no occasion to take it even if he had so desired. Still less do I regard it as a decision as to the inapplicability of Article 132 of the Act of 1877 as interpreted by their Lordsips in *Vasudeva Mudaliar* v. *Srinivasa Pillai* [1], or of Article 132 of the present Act to a suit for sale by a mortgagee on a simple mortgage governed by the Transfer of Property Act.

Further taking Article 145 to have been the article applicable, I think that on the finding that twelve years' adverse possession had not been proved, the question whether such possession if proved would have been adverse to the mortgagee though not entitled to possession cannot be considered to have been decided, as it does not appear to have been raised and there was no occasion or opportunity for the respondent to raise it. Moreover,

1. (1907) I. L. R. 30 M. 426, s. c. 17 M. L. J. 444.

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as was acutely pointed out by Munro, J., it is not clear that it arose on the facts, because the Collector took possession before that date of the mortgage sued on, and if his possession was held adverse to the mortgagee, the latter would have been clearly barred by twelve years' adverse possession commencing before the date of the mortgage.

I would answer the reference in the negative.

Sadasiva Aiyar, J.

Sadasiva Aiyar, J:—One of the reasons given for the decision in the Full Bench case in *Peria Aiya Ambalam* v. *Shanmugasundaram*.[1], is that "where more than one inference may be drawn, that inference should not be drawn which imputes a wrongful act to a person." In that case, the mortgagee in possession was ousted by a trespasser and it was held that the trespasser should not be imputed with an intention to injure the mortgagor also, if it could be helped. His trespass against the mortgagee was, no doubt, wrongful but (if I interpret the above passage correctly,) a further wrongful intention against *the mortgagor also* need not and should not ordinarily be imputed to the trespasser.

That reason appears to me to be equally or rather *a fortiori* applicable to a case where a trespasser, who dispossessed the mortgagor is pleading that his possession is adverse to the rights of a simple mortgagee who is not entitled to possession of the mortgaged land.

The question whether when the simple mortgagee is not entitled to possession, even a distinct notice by the trespasser to that mortgagee that he (the trespasser) denies the mortgagee's right could be treated as adverse possession of the incorporeal rights of the mortgagee has a sort of indirect bearing on the question before us and was therefore argued by the appellants' learned Vakil (Mr. G. S. Ramachandra Aiyar). On this point I have heard nothing which compels me to recede from the view expressed by me in *Lakshmi Narayana Aiyar* v. *Ulagammal*[2] that it is very difficult to establish the claim of title by adverse possession of an incorporeal right. With the greatest respect to certain *obiter* observations contra in the judgment in *Peria Aiya Ambalam* v. *Shanmugasundaram* reported in 26 M.L.J. 140 *et seq* I am unable to concur with them. Assuming that the Roman Law is different (See *Nallamuthu Pillai* v. *Betha Nairkan*[3], which was,

1. (1913) 26 M. L. J. 140. 2. (1914) 28 M. L. J. 256.
3. (1899) I. L. R. 23 M. 37 ; s. c. 9 M. L. J. 258.

however, a case where the adverse possession began *before* the date of the mortgage) that rule of Roman Law was probably based (as pointed out by my learned brother Srinivasa Aiyangar, J. in the Judgment now to be pronounced by him on the rights of a simple mortgagee under the Roman Law to get possession of the hypotheca after the money became due by expiry of the time fixed for payment. If, however, it is otherwise it does not then seem to me to be such an equitable rule, as ought to be followed by Indian Courts, having regard to the fact that the English Statute Law has deliberately laid down the opposite rule, even though a mortgagee under the English form of mortgage obtains the legal ownership of the mortgaged property unlike an Indian mortgagee.

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If some tangible benefit (periodical or otherwise such as the right to receive rents and profits though not to get physical possession) is derivable by the owner of an incorporeal right and if he is prevented by the trespasser from getting that benefit and if the trespasser obtains that benefit himself, a dispossession of such incorporeal right is conceivable (See, *Venkataramanachari* v. *Thirunaranachari* [1],) but not in other cases. I therefore adhere to the views expressed by Napier, J., and myself in *Venkata Krishna Moorthi* v. *Bheemakka* [2], and I willingly follow the very carefully considered judgment (if I may respectfully say so) in *Parthasarthy Naicken* v. *Lakshmana Naicker* [3], whose authority is endorsed by the Judgment just now pronounced by my Lord answering the reference in the negative.

Srinivasa Aiyangar, J.

Srinivasa Aiyangar, J.:—I think on principle the question under reference admits only of one answer, *i. e.*, in the negative. The rights of a simple mortgagee of immovable property are now settled by statute. He is not an owner and is not entitled to possession of the mortgaged property. He has no claim to the produce or the rents and profits of the property either before or after the mortgage money becomes due. A simple mortgage does not vest any estate in the mortgagee. Ghose on mortgages page 76, IV Edition; *Papamma Rao* v. *Ramachendra* [4]. His only right is to cause the property to be sold through Court. The mortgagor as owner is entitled to remain in possession and receive

1. (1914) 2 L. W. 212 at 217.
2. (1914) 26 I. C. 295 (13th October).
3. (1910) I. L. R. 35 M. 231.
4. (1896) I. L. R. 19 M. 249 (P. C.) at 252; s. c. 6 M. L. J. 53.

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the rents and profits of the land; he is not accountable for them or for the use he makes of his property to the mortgagee provided he does not commit waste so as to render the security insufficient. The right of a simple mortgagee is however a real right, and he is entitled to enforce his charge even against a purchaser for value without notice. Except for a possible difference as regards their enforceability against purchasers for value without notice, there is no difference in their legal incidents between a simple mortgage and a charge. See observations of Krishnaswami Aiyar, J. in *Balasubramania* v. *Sivaguru* [1]. A suit by a simple mortgagee to enforce payment of the mortgage money by a sale of the property is governed by Article 132 of the Limitation Act and he is entitled to bring such a suit within 12 years after the motgage money had become due. (See *Vasudeva Mudaliar* v. *Srinivasa Pillai* [2]. His right cannot be extinguished under S. 28 of the Limitation Act, though the bar of the remedy in the case of a real right may have the same effect as the extinction of the right itself. As he is not entitled to possession of any sort or kind of the mortgaged property, there can be no adverse possession against him. Can then his rights be affected by a trespasser taking possession of the mortgaged property ousting the mortgagor in possession? If they are, he must have a cause of action against the trespasser. Abdur Rahim, J. thinks he has. He says "that these two cases" (referring to *Ram Coomar Sien* v. *Prosunno Coomar Sein* [3], and *Sheoumber Sahoo* v. *Bhowaneedeen Kulwar* [4], make it clear that the mortgagee is not without remedy against a trespasser taking possession of the mortgaged land, although it may be that he is not entitled to possession under his mortgage, and I myself do not see any valid reason why the mortgagee should not be able under such circumstances to protect his interests by proper proceedings." *Ramasami Chetti* v. *Ponna Padayachi* [5]. I am unable to see what suit a simple mortgagee is entitled to bring to protect his interests as against a trespasser, and there is no indication in the learned Judge's judgment as to the nature of the proceedings by which he is to protect his interests. He obviously cannot bring ejectment against the trespasser and he certainly cannot bring a suit praying that possession be delivered to the mortgagor

1. (1909) 21 M.L.J. at 562 at 568. 2. (1907) I.L.R. 30 M. 426 (P. C.)
3. (1864) 1 W. R. 375. 4. (1870) 2 N. W. P. H. C. 223.
5. (1910) I. L. R. 36 M. 97 at 103.

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as the mortgagor's possession is not in any sense for the benefit of the simple mortgagee. A simple suit for declaration of the mortgagee's right when such a right is denied by the trespasser may probably be brought, but that is a proceeding which the mortgagee is not bound to take, and a decree in such a suit cannot save the rights of the mortgagee from becoming barred if otherwise they would be. The cases referred to by the learned Judge were cases where the mortgagee was entitled to possession either before or after the mortgage amount had become due, and it is possible in those cases for a mortgagee to bring ejectment against a trespasser. A squatter taking possession of the mortgaged property may equally affect the interests of the mortgagee and the mortgagor where both of them are entitled to or are in possession of their respective interests in the property where such interests are capable of possession. Even incorporeal property may be capable of possession in law, but such possession involves either actual possession of tangible property or the reciept of some tangible benefit therefrom. Such possession may also be protected by possessory remedies. It must also be remembered that the mortgagor does not hold possession of the property on behalf of the mortgagee and the mortgagor is not charged with the duty of protecting the interests of the mortgagee, as a trustee or the Karnavan of a tarwad or the manager of a joint Hindu family is charged with the duty of protecting the interests of a *cestui que trust* or the junior members of the family. (See the observations of Sundara Aiyar, J., in *Ambalavana Chetty* v. *Singaravelu Udayar* [1]. The mortgagor's laches or negligence should not affect the rights of the mortgagee. If, therefore, a simple mortgagee has no cause of action against a trespasser, his rights should not be affected or be extinguished by the operation of any law of limitation. It is true that a simple mortgagee may be entitled to enforce payment of the money due, by a sale of the property if the mortgage amount had become due; but that cause of action accrues to him owing to the default of the mortgagor and not on account of any act of the trespasser. If the mortgage money had not become due, he cannot institute a suit to recover it though a trespasser may have taken possession of the mortgaged property and it would be most unreasonable to hold that the

1. (1912) M. W. N. at 680.

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mortgagee's rights are extinguished by the extinction of the mortgagor's title by 12 years' adverse possession before the mortgagee is in a position to protect his rights. To adopt the language of the Master of the Rolls *in re Nisbet and Potts' Contract* [1], "unless and until the right of the mortgagee has been in some way infringed so that it becomes necessary for him to enforce that right, there is no reason, either in principle or in fairness, why his right should be in any way affected." I see no reason therefore for holding that the extinction of the mortgagor's title by the adverse possession of a third party operates to extinguish the mortgagee's right to enforce his charge, any more than easements over the property.

Subramania Aiyar, J., however seems to think that a hypothecation right is liable to be affected by prescription. He says that "there can be no doubt that such a right is liable to be affected not only by lapse of time as between the creditor and the debtor, but also by possession of the hypothecated property held for the required period by a third person on a claim inconsistent with the rights of both the creditor and the debtor" and relies on some passages in Salkowski's Roman Law, Mackledey's Roman Law and Hunter's Roman Law. In the passage just quoted the learned Judge seems to assume that a mere claim to hold property free of a charge could operate to extinguish such rights although the act of possession by itself may not affect it. If the trespasser's possession by itself could not affect the rights of the simple mortgagee the assertion by such trespasser could not possibly have any effect. As stated in Angell on Limitations "The principle on which the statute of limitations is predicated is not that the party in whose favour it is invoked has set up an adverse claim for the period specified, but that such adverse claimed is accompanied by such invasion of the rights of the opposite party as to give him a cause of action, which having failed to prosecute within the time limited by law, he is presumed to have extinguished or surrendered. A mere claim of title unaccompanied by adverse possession, gives no right of action to the person against whom it is asserted and consequently his rights are unaffected by statute." (See Angell on Limitations at page 398).

In Roman Law there was, it seems, in later times, no distinction between a pignus and a hypotheca and in both forms of

1. (1906) L. R., 1. Ch. at 402.

mortgage the mortgagee was entitled to the possesssion of the mortgaged property. In pignus the possession was given to the mortgagee at the time of the transaction, while in hypothecation the mortgagee was entitled to obtain possession after the debt became due. Hunter's Roman Law pages 436 and 447 (Remedies), Salkowski's Roman Law at page 485 and Mackledeys Roman Law at page 285. It is instructive to note that Lord Hobhouse thought that except for long practice and the Transfer of Property Act, it might be reasonably argued that a simple morgagee in India was entitle to usufructuary possession under the terms of his contract. (*Papamma Rao* v. *Ramachandra* [1].)

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Are we then compelled to answer the question in the affirmative by any authority binding on us? Reliance was placed on the decisions of the Privy Council in *Prannath Roy Chowdry* v. *Rookia Begum* [2], and *Karan Singh* v. *Bakar Ali Khan* [3]. The plaintiff in the case reported in *Prannath Roy Chowdry* v. *Rookea Begum* [2] had obtained a mortgage by conditional sale from the owner and had instituted proceedings to foreclose the mortgage under Regulation XVII of 1806. After obtaining a foreclosure order he brought a suit to recover possession of the properties, as owner against the defendant who was in possession claiming under a purchase from the mortgagor which however was not proved or admitted in the case. The question was whether the plaintiff had validly foreclosed the mortgage by conditional sale so as to enable him to bring ejectment as owner. The proceedings for foreclosure were taken more than 12 years after the expiry of the term for the repayment of the mortgage money. Under Bengal Regulation III of 1793 a suit was barred "where the cause of action shall have arisen 12 years before any suit shall have been commenced on account of it." In discussing the question whether the plaintiff was entitled to bring a suit for foreclosure after the expiry of 12 years, their Lordships pointed out that a suit for foreclosure against the mortgagor or against persons claiming in privity with the mortgagor may not be barred, while a suit for possession against a stranger who claimed to hold the property free of any mortgage may be barred. But their Lordships do not say that the mortgagee's right may be barred by the possession of an adverse claimant, even if the mortgagee's right to possession had not accrued, or where the mortgagee was

1. (1896) I. L. R. 19 M. at 254. 2. (1859) 7 M. I. A. 323.
3. (1882) I. L. R. 5 A. 1.

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not entitled to possession at all. On the other hand, in the case in *Anundo Moyee Dossee* v. *Dhonendro Chunder Mookerjee* [1], their Lordships say "if the title of the mortgagee to *enter* by reason of a default having occurred before, had accrued, and if the purchaser under such a title, *i.e.*, as purchaser at an execution sale, had been in possession for twelve years, believing himself to be the *bona fide* owner, under a claim to the ownership of the property, and not being in possession in any way as mortgagor or under the mortgagor, they are of opinion that the suit to disturb the possession of such a purchaser ought to be brought within the twelve years after the commencement of his possession." That I think conclusively shows that a mortgagee who had no right to enter was not affected by any adverse possession.

In *Karan Singh* v. *Bakar Ali Khan* [2], the plaintiff a simple mortgagee sued to enforce his charge. The mortgages were executed in the year 1862 on behalf of the daughter's sons of the last male owner. The property was in the possession of his widow till the end of 1860. It appears that on the death of the widow disputes arose as to the title to the property between the defendant Karan Singh and the daughter's sons of the last male owner, each claiming the property as his. Neither party was in possession, the Collector having taken possession of the property in 1861 soon after the death of the widow to secure the Government Revenue pending the settlement of the disputes between the rival claimants. The mortgages were executed in January and October of 1862 on behalf of the daughter's sons when they were not in possession of the property and before the disputes as to title were settled. In 1863 by an award the title of the defendant Karan Singh was established against the daughter's sons in a proceeding to which the mortgagee was not a party and the Collector handed over possession of the property to Karan Singh and also paid him the income of the estate in his hands. The plaintiff brought the suit in July 1874 and the defendant pleaded that he had been in adverse possession for the statutory period of 12 years from the year 1861 treating the possession of the Collector as his possession. If the defendant's contention was correct it is obvious that the mortgagee would not be entitled to sue to enforce his mortgages as the effect of the defendant's possession would have been

1. (1871) 14 M. I. A. 101 at 111. 2. (1882) I. L. R. 5 A. 1; s. c. 9 I. A. 99.

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to extinguish the title of the mortgagor from the year 1861; *Rajah of Venkatagiri* v. *Isakapalli Subbiah* [1], and *Nand Kumar Doobey* v. *Ajodhya Sahu* [2]. The sole question in the case therefore was whether the defendant was in adverse possession from 1861. When their Lordships speak of the possession of the plaintiff or of the possession of the defendant adverse to the plaintiff, they were, I think, referring to the mortgagor under whom the plaintiff claimed, as they speak of possession and adverse possession in 1861 before even the mortgages were executed. There is really no warrant for the inference that their Lordships assumed that a suit by a simple mortgagee to enforce his charge by sale was a suit for possession, that such a mortgagee was entitled to possession or that such a suit was governed by Article 145 of the Limitation Act of 1871 corresponding to Article 144 of the Acts of 1877 and 1908. In the Act of 1859 there was no special provision for suits by a mortgagee except that in suits by a mortgagee to recover possession of the mortgaged properties from the mortgagor in Courts established by a Royal Charter the time when the cause of action arose was defined by S. 6. They were governed by Clause 12 of S. I and even a suit by a hypothecatee to enforce his charge was held to be a suit for recovery of an interest in immovable property and the period of limitation was 12 years from the time the cause of action arose. *Surwan Hussein* v. *Shahabzadah Golam Mahomed.* [3], *Chetti Goundan* v. *Sundaram Pillai* [4], and *Juneswar Dass* v. *Mahabeer Singh* [5]. Sir Barnes Peacock is reported to have said that "if land is mortgaged as security for a loan, in addition to a covenant for the payment of the money, the mortgagee may sue the mortgagor for a breach of the covenant, and he may also bring an action of ejectment to recover the land mortgaged as a collateral security. It appears to me that the charge upon the land created an equitable interest in the land, and that a suit brought to enforce that charge is in substance and in effect a suit for the recovery of that interest" see page 174 in 9 W. R. A simple mortgagee under the Transfer of Property Act can neither bring ejectment to recover the land mortgaged, nor can it be said that his right is an equitable interest. As pointed out by Seton Karr, J. in the same case it must be admitted that the language of the article was not

1. I. L. R. 26 M. at 417.
2. (1911) 14 C. L. J. 292 at 298.
3. (1867) 9 W. R. 170.
4. (1864) 2 M. H. C. R. 51.
5. (1875) I. L. R. 1 C. 163. (P. C.)

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quite appropriate as applied to a suit to enforce a charge by sale. Clause 12 was however applicable whether the suit was against the mortgagor or persons claiming under him or against a trespasser in possession. When the Act of 1859 was repealed and the Act of 1871 passed, a special article was enacted in respect of suits to enforce payment of money charged in land *viz.*, Article 132, Article 149 in respect of suits in the Chartered High Courts to recover possession of the mortgaged property from the mortgagor, and Article 135 for similar suits in Moffusil Courts but the words "from the mortgagor" are omitted. It has been held that Article 135 applies to suits for possession against both mortgagors and strangers, *Surnomoyee Dasi* v. *Srinath Das* [1]. There was no special article as regards suits for foreclosure; (that was first introduced in the Act of 1877 Article 147). Clause 12 was re-enacted as Article 145, but with a change in the wording. Instead of the words 'for the recovery of' the words 'for possession of' were substituted which are even less appropriate to a suit for sale. It is admitted that Article 132 of the Act of 1871 was applicable to suits by a simple mortgagee instituted against the mortgagors or persons claiming under them to enforce the charge by sale of the mortgaged property, and the Privy Council in *Vasudeva Mudaliar* v. *Srinivasa Pillai* [2] say that it was perfectly settled that such suits were governed by that article. The Privy Council in the above case make no distinction whatever between suits against mortgagors and against strangers in possession of the mortgaged property and the language of the article does not warrant any such distinction. But we are asked to infer that their Lordships in the case in *Koran Singh* v. *Bakar Ali* [3], assumed without question or discussion that such a suit was not governed by Article 132, but was a suit for possession against a stranger in possession of immovable property governed solely by the residuary Article 145, that they assumed unnecessarily a metaphysical possession in the simple mortgagee and that he was affected by a vicarious bar. I decline to draw any such inference. The Privy Council characterised Act XIV of 1859 as an inartificially drawn statute and the later Act of 1871 as a "more carefully drawn statute." (See *Maharana Futtehsangji Jaswantsanji* v. *Dessai Kullianraiji Hekoomutraiji* [4], and *Delhi and London Bank Limited* v.

1. (1886) I. L. R. 12 C. 614 at 620.
2. (1907) I. L. R. 30 M. 426 at 433. 3. (1882) I. L. R. 5 A. 1.
4. (1873) 21 W. R. 178. (P. C.)

Orchard [1]. It seems to me that the Legislature in 1871, specially enacted Article 132, for all suits by simple mortgagee to enforce the payment of money charged by sale of the property mortgaged instead of leaving some suits to be governed by that article and others by Article 145.

It is unnecessary to deal with the other cases as they are reviewed by Munro J. in *Parthasarathy Naiken* v. *Lakshmana Naicker* [2], and Karamat Hussain J. in *Nandan Singh* v. *Jumman* [3].

In England the matter is settled by statute. I may however refer to a passage in the judgment of Farwell J. in the case of Re *Nisbet and Pott's Contract* in the first Court wherein he holds that a charge on the property can be enforced against a trespasser who acquired a title to the property by adverse possession (1905) 1 Chancery at page 397.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Sadasiva Aiyar and Mr. Justice Napier.

Ramakrishna Pillai ... *Appellant* (Plaintiff.)*

v.

Muthuperumal Pillai and others ... *Respondents (Defendants Nos. 1 to 21 and 23 to 40, 42 and 43 and L. Rs. of the 14th and 30th respondents.)*

Ramakrishna Pillai v. Muthuperumal Pillai.

Civil Procedure Code, O. 41 R. 1—Civil Rules of Practice R. 49—Production of printed copy of judgment—Necessity for—Rule ultra vires *under Civil Procedure Code of* 1882*—Not under Civil Procedure Code of* 1908*—Civil Procedure Code, S.* 157*—Effect of—Not validated by.*

Per Sadasiva Aiyar, J.—Rule 49 of the Civil Rules of Practice requires the production of a printed copy of the judgment appealed against along with the appeal memorandum when the judgment contains more than 700 words but having regard to S. 652 Civil Procedure Code of 1882, that rule being inconsistent with S. 541 was *ultra vires* of the High Court and though under S. 122 and 128 of the present Civil Procedure Code, the High Court has power to enact rules inconsistent with the rules in the Code, S. 157 has not the effect of validating the rule which was *ultra vires* at the time of its enactment.

Per Napier, J.—Rule 49 of the Civil Rules of Practice does not forbid the filing of a certified copy even when the judgment contains more than 700 words, as such filing a certified copy is sufficient compliance with O. 41 R. 1 and the appeal is validly presented for purposes of limitation.

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* L. P. A. No. 16 of 1913. 6th September 1915.

1. (1877) I. L. R. 3 C. 47. (P. C.)
2. (1910) I. L. R. 35 M. p. 231.
3. (1912) I. L. R. 34 A. 640.

Ramakrishna Pillai v. Muthu-perumal Pillai.

Appeal under Clause 15 of the Letters Patent against the judgment of the Hon'ble Mr. Justice Sankaran Nair in Second Appeal No. 863 of 1912, preferred against the decree of the District Court of Tinnevelly in Appeal Suit No.——of 1911 (Original Suit No. 202 of 1911 on the file of the Court of the Addl. District Munsif of Tinnevelly.)

[The facts are sufficiently stated in Mr. Justice Napier's Judgment.]

C. S. Venkatachariar for Appellant.

M. D. Devadoss for Respondent.

The Court delivered the following

Sadasiva Aiyar, J.

Judgments:—*Sadasiva Aiyar, J.*—Under the Old Civil Procedure Code, S. 652, the High Court had power to make rules to regulate the procedure in the mofussil courts only so far as such rules were consistent with that code.

S. 541 of the old Code made it compulsory on the appellant to produce a copy of the decree and a copy of the judgment (the latter unless dispensed with by the Appellate Court) along with the memorandum of appeal. I am inclined to hold that it is not consistent with that section to make any rule imposing a further obligation on the appellant that the copy which he produces should be a printed copy. In *Madurai Pillai* v. *T. Muthu Chetty* [1], a Full Bench of this Court held that where a rule abridges a substantive right granted by the statute, such a rule is *ultra vires*, unless the statute itself empowers the rule-making authority to alter the provisions in the statute. In that case, the substantive right in question was a right to have a trial by a Full Bench of the Presidency Small Cause Court. The right to appeal which is the right in question in the present case is clearly no less a substantive right.

Rule 49 of the Civil Rules of Practice was passed in pursuance of the powers given to the High Court by the old Civil Procedure Code. Though that rule does not expressly state that the production of a printed copy with the memorandum of appeal is compulsory where the judgment of the Lower Court is more than 700 words in length, the sentence occurring therein that " in cases where the length of the judgment or order does not exceed 700 words, the production of a printed copy is not compulsory " seems to me to enact by an implication that such production is compulsory in the case of a judgment or order exceeding 700 words.

1. (1914) 1 L. W. 172.

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Sadasiva Aiyar, J.

Taking it then that Rule 49 when it was passed, was *ultra vires*, we have to consider the effect of S. 157 of the present Civil Procedure Code which enacts, among other things, that rules made under the former Code of the Civil Procedure shall, so far as they are consistent with the present Code of 1908, have the same force and effect as if they had been made under the present code. Under the new code, the power of the High Court to make rules is governed by S. 122 and 128. The difference between the old S. 652 and the new S. 122 and 128 so far as this question is concerned is that while under S. 122 the rules had to be consistent with all the provisions of the old code, the new S. 122 and 128 empower the High Court to annul, alter or add to all or any of the rules framed in the first schedule attached to the new code. S. 541 of the old code relating to the presentation of the appeal corresponds to O. 41 R. 1 in the first schedule of the new code and hence the provision in O. 41, R. 1 about producing a copy of the judgment might, (according to Ss. 122 and 128) be validly changed by a rule of the High Court requiring a printed copy instead of an ordinary certified copy. Thus Rule 49 of the Civil Rules of Practice, if it can be treated by virtue of S. 157 to be a rule passed under the new code would be a valid rule. But does S. 157 continue the rules passed under the repeated enactment even though those rules were beyond the powers given to the High Court by the repealed enactment? In other words, are the rules, purporting to be framed under the old code but beyond the powers given thereby, within the meaning of the expression 'rules made' under any code of civil procedure' occurring in S. 157 of the new code? Does not the word 'made' mean 'validly made.' In *re the District Munsif of Tiruvalur* [1], the converse proposition was upheld, namely, that rules made under the old Civil Procedure Code, though inconsistent with an Order of the Civil Procedure Code, remained in force until new rules were framed under the new Civil Procedure Code. But I do not think that that ruling helps us much in the decision of the question whether rules which were invalidly framed under the old code become valid if consistent with the new code. I am inclined to hold that rules which though purporting to be made under the old code were beyond the powers given by the old code do not become valid by reason of the fact that, if they had been made

1. (1913) I. L. R. 37 M. 17.

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Sadasiva Aiyar, J.

under the new code, they would be valid. I think the expression 'rule made' in S. 157 must mean rules properly and validly made, in other words made with jurisdiction by the proper authority.

In the result and for the reasons above given, I would allow the appeal and direct the District Judge to hear the appeal preferred to his court the appeal having been properly presented within the limitation period along with a certified copy of the judgment of the Court of First Instance, though that copy was not a printed copy. Costs hitherto will abide.

Napier, J.

Napier, J.—The District Judge has dismissed this appeal holding that it is out of time and declining to extend the period under S. 5 of the Limitation Act. It is common ground that if the manuscript copy of the judgment of the Lower Court supplied by the Court and certified correct and filed in the Appellate Court can be used, the appeal would be in time. The District Judge has held that the judgment being over 700 words and not being printed it cannot be used as its use is forbidden by the civil rules of Practice, 1905, R. 49, and this view is upheld by the learned judge of this Court before whom the second appeal came in for hearing under O. 41 R. 11. The appeal is filed under O. 41, R. 1 which requires that the memorandum shall be accompanied by a copy of the decree and (unless dispensed with by the Court) of the judgment on which it is founded. If I thought that R. 49 of the Civil Rules of Practice had the effect contended for, I should think it necessary to consider whether so long as O. 41 (1) remains in its present form the rule was not *ultra vires* but I am of opinion that the rule has not that effect. It is true that the rule says in cases where the length of the judgment does not exceed 700 words, the production of a printed copy is not compulsory. The word 'produced' is not to be found in the Code in this connection and though it may be taken to mean produced for the purpose of an appeal, the rule does not make clear whether the production refers to the work of the copying department or the work of the appellant. Still less does it say that only a printed copy can be filed with the memorandum of appeal. The rule itself is a direction to the copying department and there is no rule that requires an intending appellant to apply specially for a copy for appeal purposes or forbids him to use a copy obtained for perusal for his appeal. Such a rule would properly appear in rules for procedure on appeal not among rules for copies of records. It

may be that the Court might refuse to take up an appeal until the appellant supplied it with a printed copy, (I express no definite opinion on that point); but I am satisfied that filing a certified copy with the memorandum is a compliance with O. 41 (1) and is not forbidden by the Civil Rules of Practice. I would therefore allow this appeal and direct the District Judge to take the case on his file under O. 41 R. 9.

Ramakrishna Pillai v. Muthuperumal Pillai

Napier, J

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Oldfield and Mr. Justice Sadasiva Aiyar.

Kuthaledath Narayana Moothod and others ... *Appellants (Plaintiffs)*

v.

The Cochin Sircar represented by Mr. A. R. Banerjee, Dewan of Cochin now by Mr. J. W. Bhore Dewan of Cochin. *Respondent in all (Defendant).*

Narayana Moothod v. Dewan of Cochin.

Civil Procedure Code S. 86—Ruling Chief—Suit against as trustee of temple in British India—Consent of Government—Necessity for—Filing of statement and pleading on merits—Whether waiver.

No suit can be maintained against a Ruling Chief of a Native State even in his capacity as the trustee of a temple situate in British India without the sanction required by S. 86 of the Code.

Pleading on the merits after pleading privilege does not amount to waiver *Chand Lal* v. *Awah Bin Umar Sultan* [1] not followed.

Appeals under Cl. 15 of the Letters Patent against the judgment of Mr. Justice Tyabji in C. R. P. Nos. 510 to 512 of 1912 presented against the order of the court of the Subordinate Judge of South Malabar at Calicut in O. S. Nos. 32, 40 and 26 of 1911.

[For facts see 25 M. L. J. 621].

T. R. Ramachandra Aiyar for Appellant.

C. V. Ananthakrishna Aiyar for Respondents.

The Court delivered the following

Judgments:—*Oldfield, J*:—The question in these appeals is whether His Highness the Rajah of Cochin was legitimately impleaded as a defendant in the connected suits in the absence of consent by the Local Government under S. 86 Code of Civil Procedure.

Oldfield, J.

* L.P.A. 133 to 135 of 1913. 12th July 1915.

1. (1896) I.L.R. 21 B. 351.

Narayana Moothod v. Dewan of Cochin.

Oldfield, J.

It is urged firstly that the absence of such consent is immaterial, because His Higness has waived his privilege, by proceeding after pleading it, to plead also on the merits.

I do not consider whether the course of his pleading did in fact amount to a waiver or not, because in my opinion the recognition of cases of waiver, as excepted from the ordinary provision of international law as understood in England, cannot be imported into the clear language of the Indian Code. The contrary view was no doubt taken in *Chandulal* v. *Awah Bin Umar Sultan* [1]. But with all respect I find the reasoning therein inconclusive and doubt whether the reference to the supposed intention of the legislature is permissible or if permissible, whether it is sufficiently comprehensive.

Secondly it is argued that the suits are really against the Deity of the suit temple, represented by the Rajah, and that, as they are not against the Rajah himself, the section is inapplicable. Reference to the plaints however shows that the suits are for relief against the Rajah and others on the ground that the first mentioned has usurped the position of trustee and has used the power thus obtained to plaintiff's prejudice. The suits are, therefore, not against the Deity as represented by the Rajah.

In these circumstances the appeals fail and must be dismissed with costs.

Sadasiva Aiyar, J.

Sadasiva Aiyar, J.—I entirely agree with the judgment just now pronounced by my learned brother. Mr. Ramachandra Aiyar relied on certain *obita dicta* found in the judgments of the learned Chief Justice and Justice Seshagiri Aiyar in the case in *Veeraraghava Aiyar* v. *Muga Sait* [2]; *et seq* for the proposition that that it is not enough merely to object to the jurisdiction to show that there was no voluntary submission by the defendant to the jurisdiction of the Court. The case of *Parry & Co.*, v. *Appasami Pillai* [3], distinctly held otherwise. The learned Chief Justice guardedly says that because there are two English cases *Boissier* v. *Brockner* [4], *Guiard* v. *DeClermont and Donner* [5], which hold that such mere objection is insufficient. *Parry & Co.* v. *Appasami Pillai* [3], "is probably no longer law". Seshagiri Aiyar, J. first says

1. (1896) I. L. R. 21 B. 851.
2. (1914) 27 M. L. J. 535.
3. (1880) I. L. R. 2 M. 407.
4. (1889) 6 T. L R. 85.
5. 30 T. L. R. 511.

Narayana Moothod v. Bhose Dewan of Cochin.

Sadasiva Aiyar, J.

that he would hesitate to follow *Parry & Co.* v. *Appasami* [1], owing to the decision of Cave, J. in the foreign case; the learned Judge then says that "the conditions of existence in this country may not justify the application of the principle enunciated by Cave, J.," and finally says that it was "unnecessary to decide" in that particular case "which of the two" conflicting decisions (2 M. series or 6 T. L. R.) should be followed". I am prepared to follow *Parry & Co.* v. *Appasami* [1], as it has not been overruled and as the reasoning therein seems to me sound and I am not prepared to follow the English cases *contra.*

I agree that the appeals should be dismissed with costs.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Abdur Rahim and Mr. Justice Spencer.

Rajam Aiyar ... ... *Appellant* * (*Petitioner Assignee decree-holder*).

v.

Anantharatnam Aiyar and others ... *Respondents* (*Defendants*).

Rajam Aiyar v. Anantharatnam Aiyar.

C. P. Code O. XXI R. 2 cl. 1 & 2—Part payment within time uncertified—Execution application out of time—Period of Limitation if extended—Limitation Act S. 20.

A part payment made out of court within the period of limitation is sufficient to save a decree from the bar of limitation even if the payment is not certified before the expiry of the period of limitation.

Lakhi Narain v. *Felamami Dasi* [2] and C. R. P. 880; of 1914, followed.

Appeal against the order dated the 1st day of November 1913 of the District Court of Trichinopoly in A. S. No. 1 of 1913 preferred against the order of the Court of the District Munsif of Kulitalai in E. P. No. 522 of 1912 in O. S. No. 677 of 1905.

K. Narayanasami Aiyar for *T. Natesa Aiyar* for Appellant.

S. Varadachariar for Respondent.

The Court delivered the following

Judgment:—This appeal raises a question of limitation. The Lower Courts have held that the appellant's petition for execution was barred and that the alleged part payments which are relied upon to save limitation though made within 3 years and would therefore be operative for that purpose did not have the desired

* A. A. O. No 18 of 1914. 4th October 1915.

1. (1880) I. L. R. 2 M. 407. 2. (1914) 20 C. L. J. 131.

Rajam Aiyar v. Anantharatnam Aiyar.

effect, because they were certified to the Court by the decree-holder more than three years after the date of the last application. The matter has to be construed with reference to S. 20 of the Limitation Act read along with O. 21 R. 3 of the Civil Procedure Code. S. 20 of the Limitation Act says that "debt" within the meaning of the section includes money payable under a decree or order of the Court. The learned pleader for the respondents has argued his client's case on the basis that there is no distinction to be drawn between decree and money payable under a decree of the Court. For the purposes of this section it is rightly conceded that there is no period of limitation prescribed for certifying payment to Court by the decree holder; but it is argued on behalf of the respondents that cl. 3 of R. 2 of O. 21 of the Civil Procedure Code which says that "a payment or adjustment certified or recorded as aforesaid shall not be recognised by any Court executing the decree" should be construed to mean that the Court cannot recognise payments made within time if they were not certified before the expiry of the period of limitation, that is 3 years. But it seems to us that the decree-holder not being tied down to any time for certifying payment to the Court, the necessary result must be that once the certificate is made, the Court is bound to recognise the payments previously made and then section 20 of the Limitation Act comes in to save limitation. There is a conflict of decisions on the point. The Calcutta High Court takes the view which we have suggested in the case, *Lakhi Narain* v. *Felamani Dasi* [1], and that ruling is followed in an unreported decision of Mr. Justice Sadasiva Aiyar in this Court in C. R. P. 880 of 1914. A different view has prevailed in the Allahabad High Court. See decisions in *Gokul Chund* v. *Bhika* [2], and *Bhajan Lal* v. *Chandu Lal* [3], and the decision in *Amir Singh* v. *Chattar Singh* [4]. For the reasons which we have given we are inclined to agree with the decision in *Lakhi Narain* v. *Felamani Dasi* [1], and of Mr. Justice Sadasiva Aiyar.

The result will be that we allow the appeal and the case must be remitted to the Court of First Instance to ascertain whether the alleged part payments were actually made and whether the other provisions of S. 20 of the Limitation Act were complied with. Costs will follow the result.

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1. (1914) 20 C. L. J. 131.
2. (1914) 12 A. L. J. 387.
3. (1914) 12 A. L. J. 825.
4. (1915) 13 A. L. J. 666.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Sadasiva Aiyar and Mr. Justice Napier.

J. Subbier ... *Petitioner * (Candidate No. 15)*

v.

M. Abboy Naidu ... *Respondent (Candidate No. 7).*

Subbier v. Abboy Naidu.

Religious Endowments Act S. 10—Appointment of Committee member—Rule 94, Civil Rules of Practice—No application to proceedings under S. 10—C. P. C. S. 115—No revision under.

Rule 94 of the Civil Rules of Practice as to taking evidence has no application to proceedings under S. 10 of the Religious Endowments Act taken by the District Court for the appointment of a committee member.

Per Sadasiva Aiyar, J.—No revision under S. 115 C. P. C. lies against the order of the District Judge making an appointment under that section.

Nature of the proceedings under the section and remedies for abuse of power considered.

Petition under Ss. 115 and 141 of Act V of 1908, praying the High Court to revise the proceedings of the District Court of Madura in O. P. No. 256 of 1913.

T.R. Ramachandra Aiyar for petitioner:—Shortly the case is this. The District Judge has appointed a member of the Devasthanam Committee under S. 10 of the Religious Endowments Act, on an application, without taking any evidence. I submit that the present proceeding is an original petition and the Court has to come to its decision on the evidence taken by it, as in the case of suits. See Civil Rules of Practice (Madras) Rules 4 cl. (8) & (9) and 91. S. 141 of the Civil Procedure Code makes the procedure prescribed for a suit applicable to proceedings under the Rel. Endowments Act. In this case there was only a verified petition where the merits of the petitioner were set forth. Proceedings under Ss. 5, 10 and 18 of the Rel. Endowments Act have been held to be judicial proceedings. *Gopala Ayyar* v. *Arunachellam Chetti* [1], *Vasudeva Aiyar* v. *The Devasthanam Committee of Negapatam* [2], *Amdoo Myan* v. *Muhammad Davud Khan Bahadur* [3].

[*Napier, J*:—Proceedings under the Rel. Endowments Act are not under the ordinary civil jurisdiction. See *Minakshi Naidu* v. *Subramaniya* [4].]

* C. R. P No. 871 of 1913. 9th September 1915.

1. (1902) I. L. R. 26 M. 85.
2. (1913) 25 M. L. J. 536.
3. (1901) I. L. R. 24 M. 685; s.c. 18 M.L.J. 326.
4. (1887) I.L.R. 11 M. 26.

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That case is not an authority for holding that they are not judicial proceedings at all. The cases above cited consider *Minakshi Naidu* v. *Subramanya* and hold that they are judicial proceedings. The Privy Council in *Minakshi Naidu's case* [1] merely give a reason for the absence of a right of appeal. That case does not take away the revisional jurisdiction of the High Court.

[*Napier, J*: What is the provision of law under which the High Court makes rules for regulating these proceedings.]

Ss. 122 and 141 of the C. P. Code give the power to the High Court. See *Amdoo Myan* v. *Muhammad Davud Khan* [2] which requires verification for applications under S. 18 of the Rel. Endowments Act. The present proceeding is a judicial proceeding and since the order of the District Judge is not based on any evidence, it ought to be set aside in revision.

S. Srinivasa Aiyangar (with K. Rajah) for the Respondent: Rule 94 of the Civil Rules of Practice does not lay down that every petition is to be heard and decided in the same way as a suit. S. 141 of the C.P. Code makes a reservation, "as far as it can be made applicable." Moreover proceedings under the Rel. Endowments Act are not contemplated by the Rules; for App. I to the Civil Rules of Practice makes it clear that the rules are made in pursuance of Acts giving a rule-making power to the High Court. The Rel. Endowments Act is not one of the Acts specified in App. I. It is a complete enactment and provides its own procedure.

[*Sadasivayar, J*: S. 122 of the C. P. Code gives the power to the High Court to make rules.]

That power is confined to making rules under the code.

[*Napier, J.*: Ss. 141 and 142 C. P. Code read together, give the power to the High Court. Cannot the High Court make rules under the Charter Act ?]

This is not a case within the appellate jurisdiction of the High Court.

In *Minakshi Naidu's case* [1] the Privy Council consider these proceedings as being outside the ordinary civil jurisdiction. The appointment under S. 10 of the Rel. Endowments Act is a matter entirely within the discretion of the District Judge, not in his judicial capacity, but in his character as a *persona designata*. It is a grotesque application of S. 141 of the C.P. Code, to say that an appointment under S. 10 of the Rel. Endowments Act can be made

1. (1887) I. L. R. 11 M. 26. 2. (1901) I. L.R. 24 M. 685; s.c. 11 M.L.J. 326.

only after evidence is gone into. There are no two parties and there are no issues, as in the case of suits. There is no provision for the issue of notice to the other side and for taking evidence in the Rel. Endowments Act. So long as the appointment does not violate the provisions of S. 10 of the Act, there is no case for the exercise of the High Court's revisional jurisdiction. *Amdoo Miyan* v. *Mahomed Davud Khan* [1]. *Somasundara Mudaliar* v. *Vythilinga Mudaliar* [2]. *Vijiaraghava Pillai, In re* [3] *Balaji Sakharam* v. *Merwanji* [4]. In a case like this a revision is more objectionable than any appeal. *Ghulam Khan* v. *Muhammad Hasan* [5].

Subbier v. Abboy Naidu.

The Court delivered the following

Judgments:—*Sadasiva Aiyar, J*:—This petition is entitled as a petition filed under both Sections 115 and 141 of the Civil Procedure Code. S. 141 corresponds to the first paragraph of the old Section 647 and is as follows:—"The procedure provided in this code in regard to suits shall be followed, as far as it can be made applicable, in all proceedings in any Court of Civil Jurisdiction." Mr. T. R. Ramachandra Aiyar who appeared for the petitioner admitted during the course of the argument that this revision petition was not filed under both the Sections 115 and 141 of the Civil Procedure Code, but only under S. 115 corresponding to old Section 622 and that Section 141 ought to have appeared in the third ground of the memorandum of Civil Revision Petition and not in the title of the petition. The memorandum contains another mistake. As corrected, or rather fully expanded, the third ground, according to the contention of Mr. T. R. Ramachandraier would be as follows: "The District Judge acted with material irregularity in not disposing of the original petition before him in accordance with the provisions of Section 141 of the Civil Procedure Code and according to R. 94 of the Civil Rules of Practice framed by the High Court under paragraph 2 of S. 652 of the old Civil Procedure Code corresponding to S. 122 of the new Civil Procedure Code." I do not think it is necessary to consider R. 94 of the Civil Rules of Practice as that rule, if it goes beyond Section 141, is *ultra vires* and so far as it is in confirmity with it, it is unnecessary. While Section 141 contains the qualifying words "as far as it can be made applicable," these words

Sadasiva Aiyar, J.

1. (1901) I. L. R. 24 M. 685.
2. (1896) I. L. R. 19 M. 285.
3. (1914) I. L. R. 38 M. 581; 27 M. L. J. 227
4. (1895) I. L. R. 21 B. 279
5. (1902) I. L. R. 29 C. 167.

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are omitted in R. 94 of the Civil Rules of Practice. But such omission cannot make the procedure in regard to suits applicable in their entirety to all original petitions, if by the very nature of such petitions, portions of the procedure relating to suits cannot be made applicable to such petitions. It was on this ground that in a foot-note case in *Amdoo Miyan* v. *Muhammad Davud Khan Bahadur* [1], Subramania Aiyar and Davies, JJ. held that in respect of an application under S. 18 of the Religious Endowments Act, the ordinary procedure in suits as to giving notice to the other side and to taking evidence before deciding the case had no application notwithstanding the terms of S. 647, of the old Civil Procedure Code (corresponding to present Section 141). So in the foot-note case in *Venkateswara in re* [2], a Full Bench of five Judges held that notwithstanding S. 647, no appeal lay against an order passed under S. 18 of the Religious Endowments Act. I therefore agree with my learned brother that the nature of the application under S. 10 of the Religious Endowments Act invoking the District Judge's power of appointment to the vacancy of a member of the Devasthanam Committee makes that part of the procedure in the trial of suits which relates to the taking of evidence by the Court not obligatory on the District Judge, though there is nothing, of course, to prevent his taking such evidence. I am further of opinion for the same reasons as were given in the foot-note case in *Venkateswara in re* [2] that not only are the provisions of the Civil Procedure Code as to an appeal inapplicable to an order passed under S. 10 of the Religious Endowments Act, but the provisions by way of revision are also inapplicable. In the Privy Council case in *Minakshi* v. *Subramanya* [3], their Lordships treat Sections 14 to 20 of the Act as standing on a somewhat different footing from S. 10, and while the proceedings of the Court under Ss. 14 to 20 are treated as coming within the ordinary Civil Jurisdiction of the District Court, an order of appointment under S. 10 is treated as outside the ordinary Civil Jurisdiction. Hence the appointment order under S. 10 is much more informal than the decision given under any of the Sections 14 to 20. In the case in *Somasundara Mudaliar* v. *Vythialinga Mudaliar* [4] the question whether the High Court could interfere under S. 622 of the old Civil Procedure

1. (1901) I. L. R. 24 M. 685 at 687. 2. (1886) I. L. R. 10 M. 98.
3. (1887) I.L.R. 11 M. 26 at 34. 4. (1896) I.L.R. 19 M. 285; s.c. 6 M.L.J. 92.

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Code with an order under S. 5 of the Act XX of 1863 appointing a temporary manager seems not to have been argued and was not considered in the judgment. As the petition in revision was dismissed on the merits, that case cannot be treated as an authority for the proposition that the High Court had jurisdiction to interfere in revision under S. 622 with an order passed under S. 5.

As regards the case in *Gopala Aiyar* v. *Arunachellam Chetty* [1] the preliminary objection seems to have been taken in that case that no revision lay, but that was overruled. It was the decision of a single Judge, and though entitled to the greatest respect, it is not binding on us, especially as even on the merits interference in revision was refused in that case also.

Coming to the case in *Vasudeva Aiyar* v. *The Devasthanam Committee of Negapatam* [2] apart from the fact that that decision is now under appeal to the Privy Council, the order revised in that case under S. 115 corresponding to old S. 622 was not an order of appointment by the District Judge under S. 10 of Act XX of 1863, but was an order passed by him accepting the result of an election held invalidly by the temple committee. Such acceptance being treated as entitling the elected person to be a committee member. Mr. T. R. Ramachandra Aiyar, however, argued that if the High Court has no jurisdiction to interfere with an appointment under S. 10, grave injustice might result as the District Judge might appoint a European or Christian gentleman as the member of a committee of a Hindu Devastanam. He even went so far as to say that a popular religious rebellion might be the result of such an appointment and that hence a power of revision is necessary in the High Court. I do not intend to deny the right of the learned vakil to put his case as strongly as possible, but one might venture to doubt whether, when there was not the slightest inclination on the part of the ordinary Hindu public to raise any objection to the control of the secular affairs and even festivals of Hindu Devasthanams by European gentlemen who were members of Revenue Boards and Collectors till Christian missionary agitation brought about the withdrawal from such management, (the Hindu public on the other hand, being satisfied and even gratified with such official control), the appointment of one of the several members of a temple committee by the District Judge (who has the best means of knowing the

1. (1902) I. L. R. 26 M. 85. 2. (1913) 25 M. L. J. 536.

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local opinions and feelings) of a European (Official or even non-official) known for his tolerance and sympathy could lead to such dire results as predicted by Mr. Ramachandraier, notwithstanding the existence of a very few persons here and there in all countries (whether religious persons or irreligious persons) who entertain an unreasoning hatred (as opposed to the common mild dislike) of everything and every body foreign. But unless a District Judge was phenomenally ignorant of law or perverse, the question as to what is to be done if a Christian actively hostile to the Hindu Religion is appointed cannot arise as Section 8 of the Act XX of 1863 clearly provides that "the members of the said committee shall be appointed from among persons professing the religion for the purpose of which the mosque, temple, etc., was founded or is maintained and though that section relates to the first appointment of committee members by the Local Government after the passing of the Act, the clear intention of the Act seems to be that when vacancies are filled up under S. 10, the qualification for membership prescribed in S. 8 will continue to apply. If against the clear intention of the Act as signified by S. 8, the District Judge appoints a bigoted Christian gentleman to fill a vanancy their Lordships suggest in *Minakshi* v. *Subramanya* [1] that it may be that the person so improperly appointed "could be removed by proceedings equivalent to proceedings by *quo warranto* in England." It may be that an injunction suit might also lie. But I might put another case which is far more likely to occur, namely, the District Judge might appoint a very bigoted Vaishnavite as a Committee member for a Saivite temple or a very bigoted Tengalai sectarian for a Vadagalai Devasthanam. We know that sectarians of the same religion sometimes hate each other more than they hate in alien religionist. It was this danger that this High Court wanted to prevent by their attempt at interference in the case in *Minakshi* v. *Subramanya* [1]. Turner, C. J. and Muthusami Iyer, J. say (see page 29) that the order appointing Minakshi Naidu as committee member of the Madura Minakshi Sundareswarar Devasthanam (a Saivite institution) ought to be set aside "because he" (Minakshi Naidu) "has pronounced himself actively in favour of the cult of Vishnu." But their Lordships of the Privy Council did not accept Mr. Doyne's contention that a person "very improper and unfit by reason of his religious qualification or moral conduct,

1. (1887) I. L. R. 11 M. 26 at 35.

might be appointed by the District Judge and that there must be a right either by appeal against the Judge's order or by suit or in some other way to remove the person so appointed." In that case, no doubt, the question directly in point was whether there was a right of appeal against the order of appointment. But the reasons given by their Lordships to veto the right of appeal also apply in full force to the right of interference by way of revision. If I understand the report of the arguments in that case rightly, Mr. Doyne who appeared against Minakshi Naidu before the Privy Council seems to have referred to the powers of the High Court under S. 622 (the revision section in the old Code) during the course of the argument as justifying the High Court's interference with the District Judge's order of appointment (see page 31) and though their Lordships do not refer to that section, they say generally that "there was an *inherent incompetency in the High Court* to deal with the question brought before it." I would therefore dismiss the petition with costs.

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Sadasiva Aiyar, J.

Napier, J.

Napier, J:—This is a petition under Ss. 115 and 141 Civil Procedure Code to revise the proceedings of the District Judge of Madura making an appointment to fill a vacancy in a temple committee, the ground for revision being an alleged material irregularity in the procedure of the Judge in that he did not proceed with the case in accordance with R. 94 of the Civil Rules of Practice and also did not take evidence. It is common ground that it is not the practice to apply R. 94 and that this procedure followed by the District Judge is the usual one and has never been challenged before. In reply, it is urged by Mr. S. Srinivasa Aiyengar that the High Court has no jurisdiction to interfere and that R. 94 does not apply to such proceedings as these. As to the right to revise there are certain reported cases of the exercise of this power *Somasundaram Mudaliar* v. *Vythialinga Mudaliar* [1], *Andoo Miyan* v. *Muhammad Davud Khan Bahadur* [2]. *Gopala Aiyar* v. *Arunachellam Chetty* [3], *Vasudeva Aiyar* v. *Devasthanam Committee of Nagapatam* [4], but Mr. S. Srinivasa Iyengar seeks to distinguish them on two sets of grounds namely (1) that proceedings under Ss. 5 and 10 of the Act stand on a different footing to those under Ss. 14, 16 and 18, and (2) that where the court has interfered under the above sections it has been on a preliminary

1. (1886) I. L. R. 19 M. 285.
2. (1901) I L. R 24 M. 685.
3. (1902) I L. R. 26 M. 85.
4. (1913) 25 M. L. J. 536.

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lega' question giving rise to the exercise of the jurisdiction. For reasons that will appear later I feel the force of the first distinction but I am unable to accept the latter and think that if we are to uphold his contention that no revision lies, we must hold that *Somasundaram Mudaliar* v. *Vythialinga Mudaliar* [1] *Gopala Aiyar* v. *Arunachellam Chetti* [2], and *Vasudeva Aiyar* v. *The Devasthanam Committee of Negapatam* [3] are wrongly decided. Mr. S. Srinivasa Aiyengar is quite prepared to argue that they are wrong relying on the decision of the Privy Council in *Minakshi* v. *Subramanya* [4]. I have to observe that in each of the three cases *Minakshi* v. *Subramanya* [4], was relied on and in one case this point was not taken and in the other two it was overruled by the Court. I desire to express no decided opinion on the point myself as I think that the petition fails on the second point, but I have the gravest doubts whether these proceedings are a "case" within the meaning of S. 115. In my view R. 94 is inapplicable to proceedings under S. 10 of the Act. These rules are made under the Civil Procedure Code, under a number of special Acts, and under all other powers of the High Court. The Religious Endowments Act is not one of the special Acts, for it contains no provision for the making of rules. It is sought however to find the power in S. 141 of the present Code, but to invoke the aid of that section we have to ascertain first whether the procedure in the Code can be made applicable. This must depend on the nature of the proceeding and the materials on which the order or decision is to be based. I do not think that R. 94 read with definitions in R. 4 (8), (9) carry us any further. It is urged that under the old rules there were no such definitions as appear in R. 4 although both sets of rules were made under the same Code which contains S. 647 in the same terms as S. 141 of this code and though the rule making power existed under S. 652, and that therefore the necessity for an original petition could not have been insisted on prior to 1905: but this argument is hardly permissible as the High Court may have intended to extend the scope of the rules in 1905. I think that what we have to decide is as stated above and that we must look at the Act in the light of the decision of the Privy Council to decide whether S. 141 makes the Code or any rule under the

1. (1896) I. L. R. 19 M. 285
2. (1902) I. L. R. 26 M. 85.
3. (1913) 25 M. L. J. 536.
4. (1887) I. L. R. 11 M. 26.

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Code applicable to these proceedings. Now *Minakshi Naidu's case* [1] clearly decides one thing, namely that there is no civil suit in proceedings under S. 10 and that the order is not a decree within the meaning of the Code of 1879 which first introduced the language now adopted with slight modification. The Privy Council dealing with the exercise of the powers under S. 10 calls it "the right of appointing a member of the committee". This phrase seems to me indicative of its nature. It is not a right to apply, nor a duty of the Court to appoint, and it is not a matter of "Ordinary Civil Jurisdiction." These phrases used by the Privy Council seem to me to be inapt for judicial proceedings. Again the Privy Council clearly identify the Court with the Judge, saying so in so many words. Then how is the right to be exercised. It is "discretionary," that may not carry the matter very far: but it is to be exercised by "a person who has the *best means* of knowing the movements ' of local opinion and feeling." If the Privy Council meant that the selection is to be made on these considerations the petition must obviously fail; for there can obviously be little use of sworn evidence when the Judge *has* to apply, what he could *not* use in ordinary proceedings, his own knowledge by hearsay repute or otherwise of local opinion and feeling. I venture very respectfully to say that this test is to be gathered from the terms of the section. The appointment is to be filled up primarily by election; failing that, by selection either by the Committee or by the Judge. Election and selection by the committee are surely intended to procure the person most desirable according to local opinion and feeling. Again S. 8 lays down that the Committee members are to be appointed "as far as can be ascertained in accordance with the general wishes of those interested." It seems to me that these words are but reproduced in another form in the language of the Privy Council. No evidence is taken by the committee in selecting:—Why should evidence be taken by the Judge? No procedure is laid down for the committee and none for the Judge and yet the Legislature was careful to provide the procedure when dealing with arbitration under S. 17 and sanction to sue under S. 18 (*vide* also S. 14, power to direct special performance). For the above reasons I am clear that no part of the procedure in a suit is applicable and that therefore S. 141 of the Civil Procedure

1. (1836) I. L. R. 11 M. 26.

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Napier, J.

Code and the Rules of Practice do not affect these proceedings. We are not asked to interfere under the Charter Act and obviously when the Judge has as in this case carefully considered the rival claims such an application could not be contemplated by the petitioner. I would dismiss this petition with costs.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

[Ordinary Original Civil Jurisdiction.]

Present:—Mr. Justice Bakewell.

Alamelammall ... *Plaintiff* *

and

P. N. K. Suryaprakasaroya Mudaliar ... *Defendant.*

Alamelammall v. Suryaprakasaroya Mudaliar.

Succession Act S. 187—Suit for issue of probate but no grant of probate owing to non-payment of stamp—Legatee cannot establish title—Court Fees Act 1870 *S.* 4.

Where on the application of the defendant for probate there was a fiat of the Judge for the issue of probate but the probate was not actually issued through the failure of the defendant to pay the requisite stamp duty, though the defendant entered upon the administration of the estate.

Held, nevertheless, that there having been no grant of the probate within the meaning of S. 187 of the Succession Act, the plaintiff legatee under the will could not maintain an action for administration as against the defendant.

The facts are fully stated in the Judgment.

C. P. Ramaswami Aiyar and *N. Chandrasekhara Aiyar* for Plaintiff.

V. V. Srinivasa Aiyengar, for Defendant.

The Court delivered the following

Bakewell, J.

Judgment:—The plaint in this suit alleges that the husband of the plaintiff died in 1911 possessed of certain properties and having made a will appointing the defendant as his executor, who entered into possession and management of the properties immediately after the testator's death but has taken no steps to obtain probate of the will. It alleges various acts of mis-management by the defendant and that the plaintiff is interested as the mother of the testator's son, who died subsequently to the testator and to whose interest the plaintiff has succeeded as heir. The prayer of the plaint is that the defendant may be directed to apply for probate of the will, that he may be ordered to account for the administration of the estate of the deceased and the

* C. S. No. 64 of 1914. 22nd September 1915.

monies collected by him or that ought to have been collected by him but for his wilful default or negligence, and that an account may be taken of the estate and the same be duly administered under the orders of this Court.

It is stated that the defendant did apply for probate and that the fiat of the Judge was obtained upon his application, but that the actual grant has not been issued through the failure of the defendant to pay the stamp duty leviable under the Court Fees Act, 1870. The will is one to which the Probate and Administration Act and the Hindu Wills Act apply, and, therefore, the case is governed by S. 187 of the Indian Succession Act which applies to wills of Hindus under the Hindu Wills Act. In the first place, I think that the fiat of the Judge upon the defendant's petition can only be read as an order that probate shall issue to the petitioner upon his complying with the statutory provisions and the rules of the Court. One of the statutory provisions with which the petitioner must comply is that he must bring in the necessary stamps. S. 4 of the Court Fees Act directs that no document of the kind specified in the schedules to the Act shall be received or furnished by any of the High Courts unless the prescribed fees have been paid.

The decision of their Lordships of the Privy Council reported in *Mungniram Marwari* v. *Gursahai Nand* [1], is strongly relied upon by the learned vakil for the plaintiff as showing that the order of the Court is sufficient without an issue of the actual grant. But it is clear from the observations of their Lordships at page 357 that they were interpreting a particular Act. Act XL of 1858—which was passed prior to the Court Fees Act of 1870—and that they disregarded the latter Act in putting a construction upon the former. The decision may also be distinguished on the ground that in the present case there has been no actual order for the issue of probate; and also the point in that case was as to whether a minor had been properly represented or not and their Lordships held that he was, as a matter of fact, represented in the proceedings and they refused to treat them as invalid merely, because the formal order had not been carried out. I do not intend to discuss the English cases which have been cited by the learned Vakil for the plaintiff. They relate to cases of executors *de son tort* in which the Court has evidently strained its powers in order to prevent misapplication of the assets of a testator. I

1. (1889) I. L. R. 17 C. 347 (P. C.).

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Bakewell, J.

do not think that it is useful to refer to cases decided under a totally different system from that which obtains in India and under statutes different in wording.

The term "probate" is defined in S. 3 of the Probate and Administration Act as "the copy of a Will certified under the seal of a Court of competent Jurisdiction, with a grant of administration to the estate of the testator," and S. 187 of the Indian Succession Act provides that, "no right as executor or legatee can be established in any Court of Justice unless a Court of competent Jurisdiction within the province shall have granted probate of the will under which the right is claimed, or shall have granted letters of administration under S. 180." The words, I think, are perfectly plain, and the intention of the Legislature is clear that the party claiming an interest under a will must prove the execution of the document and its terms by the particular procedure which has been laid down by the Legislature. *Lakshmanna* v. *Ratnamma* [1], supports this construction. It is not sufficient if the actual document be produced in the suit and the plaintiff prove it in the way in which ordinary documents are proved; that is what the plaintiff apparently sought to do in this case to go into Court and to put the document in as an ordinary exhibit. The plaintiff claims as heir of a legatee, and is, therefore, under the section only in the position of legatee, and I hold that she must establish her title by production of the evidence required by the section, that is, a grant of probate issued by a Court of competent jurisdiction. On this ground the suit fails and must be dismissed with costs.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

[Ordinary Original Civil Jurisdiction.]

Present :—Mr. Justice Bakewell.

Kunthalammal ... *Plaintiff**

v.

P. N. K. Suryaprakasaroya Mudaliar and others ... *Defendants.*

Kunthalammal v. Suryaprakasaroya Mudaliar.

Will—Residuary clause—Construction—English Rules of—Inapplicability—Fund existence of which unknown to testator—Intestacy in respect of—Release under mutual mistake as to—Effect of.

The residuary clause in the form in which it appears in English wills is practically unknown to the ordinary testator in Madras and the rules which are

* C. S. No. 274 of 1914. 1st October 1915.

1. (1913) I. L. R. 38 M. 474 ; s. c. 25 M. L. J. 556.

Kunthal-ammal v Suryaprakasaroya Mudaliar.

laid down by English Courts as to the construction of those clauses are therefore not applicable here.

Where under a will dated 5—12—1905, the testator after stating the properties which he intended to dispose of, and after making certain dispositions, in para 13 provided that "the sum which may be left after deducting the abovementioned legacies and such other expenses shall be utilised in my name for a pooja." etc., but at the time of the will, there was a fund in court to the credit of the testator unknown to him.

Held, that Cl. 13 did not apply to this amount and it went to the heirs as on an intestacy.

Held, also that a release by the natural heir of all his claims against the estate before the mistake was discovered could not affect his rights to the money.

The facts are fully stated in the Judgment.

C. P. Ramaswami Aiyar and *A. Durasami Aiyar* for Plaintiff.

P. Sambandam and *N. Chandrasekhara Aiyar* and others for Defendants.

The Court delivered the following

Bakewell, J.

Judgment: — One Dakshinamurthi Mudaliar was entitled to certain monies in this court under decree in Suit No. 45 of 1889. By an order in that suit, dated the 27th March 1893, certain monies amounting to Rs. 4,056-12-3 were directed to be transferred by the Registrar to the Accountant-General for investment. These monies represented certain jewels which were found to be part of the inheritance of Dakshinamurthi Mudaliar and not to have passed under the will of his father. At the date of the decree Dakshinamurthi Mudaliar was a minor, but having attained his majority he applied, in February 1904, for payment out of the funds in court; and it appears from Exhibits H and H1, the certificate of funds issued by the Accountant-General, that his application was confined to the monies specified in that certificate. Owing to some mistake on the part of the legal advisers of the plaintiff in that suit, the monies in the hands of the Registrar of the court were not transferred to the Accountant-General in pursuance of the order of the 27th March 1893 and were lost sight of when the application was made by the plaintiff for payment out to him.

This is clearly stated by the present 1st defendant in an affidavit filed by him in that suit on the 8th of August 1914, Exhibit, C. In paragraph 8 he states, "It appears that the said sum of Rs. 4,056—12—3 which appears to have remained in the hands of the Registrar of this Honourable Court was not known to exist and was consequently overlooked and I have now come to know that the said sum of Rs. 4,056—12—3 is standing to the

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credit of this suit". The amount was accordingly paid out of Court to the 1st defendant who claimed it as the executor of the will of Dakshinamurthi Mudaliar.

This will is dated the 5th December 1905 and the testator died in the same month. The 1st defendant was appointed executor of the will and has been administering the estate of the deceased, and this suit is brought by the widow of the deceased, on behalf of herself and the other legatees under the will, for an account of the administration of the estate, and for its administration under the orders of the court. The question has arisen as to whether this sum of Rs. 4,000/- and odd passed to the residuary legatee under the will. The will follows the form, which is very well known in this court, of first stating the property which the testator intends to dispose of and then dividing it up amongst the various beneficiaries. Clause No. 2 of the will reads as follows :—" The house No. 25 in Nattu Pillayar Covil Street and ready money were received (by me) under an Order of the High Court according to my adoptive father's will. Of the amount left deducting the sum spent therefrom, not only is a certain portion lodged in fixed deposit in Arbuthnot's House in my name and in the name of my senior elder brother P. N. K. Suryaprakasaroya Mudaliar but the remaining sum is in the shape of secured and unsecured debts and ready money." The testator then proceeds to give various specific and pecuniary legacies, and in clause 13 he says, " The sum which may be left after deducting the abovementioned legacies and such other expenses shall be utilised in my name without defect for pooja once, that is, daily, and repairs and other charities for the temple of Sri Vaideswarar in Poonamallee". Having regard to the fact that the existence of this sum of Rs. 4,000/- and odd was unknown to the testator at the time, and to the statement made by him that he is dealing with a particular house and the monies which had been already received by him from the High Court, I think that the words in clause 13 refer to the residue of the monies in his hands which have not been already disposed of by him under the will, and that the sum of Rs.4,000/- and odd is not disposed of by him. I may point out that the residuary clause in the form in which it appears in English wills is practically unknown to the ordinary testator in Madras and that the rules of construction which have been laid down by English Courts are not applicable.

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The defendant has also pleaded a release by the plaintiff of all claims against him, but it is clear from the evidence that this document was executed by the plaintiff when she was a minor. It is also perfectly clear that it was executed under a mutual mistake and for that reason also it is not binding on the plaintiff.

The plaintiff has called for and put in a book purporting to be an account of the 1st defendant of his administration of the estate. It is not in his affidavit of documents and I think it is obviously a fraudulent concoction. Certain entries which appear in it have been proved, by the evidence called by the plaintiff, to be untrue.

There will, therefore, be a decree declaring that the sum of Rs. 4,056—12—3 did not pass under the will of the deceased but will go to the plaintiff as on an intestacy, that the estate must be administered by the Court and that the 1st defendant must account from the date of the death of the deceased on the footing of wilful default. The 1st defendant will pay the costs of the suit up to date. The 1st defendant is ordered to pay this sum of Rs. 4,056-12-3 into court within 10 days.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Sadasiva Aiyar and Mr. Justice Bakewell.

Muthu Gounden ... *Appellant* (1st Defendant)*

v.

Anantha Gounden ... *Respondent (Plaintiff).*

Muthu Gounden v. Anantha Gounden.

Easements Act S. 15—"Peaceably and openly enjoyed"—Meaning of—Verbal protests—Insufficient to prevent acquisition—Limitation Act Ss. 26, 27 not applicable where Easements Act applies—Suit, within 2 years of interruption—Other modes of acquisition not interfered with by Act.

Per *Sadasiva Aiyar, J.*:—Under S. 15 of the Easements Act, mere verbal protests on the part of the servient owner against the enjoyment by the dominant owner are insufficient to prevent the acquisition of the easement. Ss. 26, 27 of the Limitation Act (1908) do not apply to the Madras Presidency where the Easements Act is in force.

Having regard to S. 15, Cl. (3) it is impossible to acquire a statutory prescriptive title to an easement unless and until the claim thereto has been contested in a suit.

S. 15 of the Easements Act does not interfere with other titles and modes of acquisitions and therefore where a party proves that he has been enjoying a right of way for a long series of years, he acquires a right thereto independently of the statute and the limitation prescribed by S. 15 would have no application to such a case.

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* S. A. No. 2373 of 1913. 24th September 1915.

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The meaning of the term "peaceable" is that the person claiming to be dominant owner has not resorted to force in his alleged enjoyment of the right.

Per *Bakewell, J.*:—The words "peaceably and openly" indicate the manner in which the dominant owner must conduct himself in his use of enjoyment of the servient tenement; the conduct of the servient owner is immaterial except so far as it goes to show the nature of the user by the dominant owner. What is meant by those words is that the user should be *nec vi, nec clam.*

Second appeal against the decree of the Court of the Temporary Subordinate Judge of Trichinopoly in A. S. No. 571 of 1912 on the file of the District Court of Trichinopoly preferred against the decree of the Court of the District Munsif of Karur in O. S. No. 670 of 1911.

K. S. Ganesh Aiyar for Appellant.

V. Ratnasomanathan for Respondent.

The Court delivered the following

Sadasiva Aiyar, J.

Judgments:—*Sadasiva Aiyar, J.*—The 1st defendant is the appellant. The suit was brought claiming the following reliefs:—

1. The establishment of the plaintiff's right of way marked A. B. in the plaint plan through the land of the defendant on the plaintiff's land.

2. For an injunction to the defendants to remove the fence which they put up across the path about 10 months before the suit.

3. For the issuing of a permanent injunction against the defendant's obstructing the path.

The Lower Appellate Court (as I read its judgment) came to the following conclusions:—

a. The plaintiff and his predecessors in title to the dominant tenement were using the plaint path for much longer than twenty years before the interruption took place in September 1910 by the act of the defendants putting up the fence. (The suit was brought in July 1911 and the evidence of the plaintiff's 2nd witness speaks to the enjoyment for 40 years).

b. Though the 1st defendant objected to the plaintiff using the way in 1907 or 1908 the plaintiff did actually continue to enjoy the right of way till the fence was put up in September 1910. (The plaintiff says in his evidence "the path was not closed" till 1910. "The pathway was closed only 5 or 6 days prior to the filing of the suit." I think the word 'suit' in this sentence is a mistake for the criminal complaint which was filed in August or September 1910. "Before that the defendants were *objecting orally*.")

c. The suit was not barred by the 2 years period of limitation prescribed by the Limitation Act as the cause of action arose

only in 1910 within a year before the suit and not in 1908 or 1907, the plaintiff not having had any interruption or restriction in the enjoyment of his rights.

On these findings, the decree of the District Munsif in plaintiff's favour was confirmed by the Lower Appellate Court. Mr. K. S. Ganesa Aiyar, Vakil, for the appellant argued.

(*a*). That the oral objections and disputes admittedly raised by the 1st defendant (see Ex. III) in 1907 and 1908 prevented the plaintiff from acquiring a right of easement by prescription under S. 26, cl. 1 of Act IX of 1908.

(*b*). That S. 26 cl. 1 of Act IX of 1908 means, (if I understood his contention aright) that a suit brought more than two years after such oral objection and dispute raised by the defendant entailed the dismissal of such a suit as barred by limitation.

It must be pointed out that Ss. 26 and 27 of the Limitation Act are not applicable to cases arising in territories to which the Indian Easements Act 5 of 1882 applies. (See S. 29 cl. 3 of the Limitation Act). The question, even as regards an easement right classed under the statutory prescription is therefore strictly not one of limitation as was supposed by the Lower Courts and as seems to have been contended by the learned Vakil. The question to be considered when what might be called an easement by statutory prescription is claimed by a plaintiff is, whether under S. 15 of the Easements Act (which applies to Madras Presidency), the prescriptive right by enjoyment for twenty years has been acquired by the plaintiff. As pointed out by Chamier, J. in *Sultan Ahmad* v. *Waliullah* [1], "the fifth paragraph of S. 15 of the Easements Act seems to render it impossible to acquire a statutory prescriptive title to an easement unless and until the claim thereto has been contested in a suit." See also *Rajrup Koer* v. *Abdul Hossein* [2] and the Judgment of Lord Macnaghten in *Hyman* v. *Van Den Bergh* [3], construing similar provisions of the English Prescription Act. As Peacock says in his book on Easements at page 435 "the right is created upon the bringing of the first action in which, by reason of the claim having been brought into question, it becomes necessary for the person claiming such right to possess it for the purpose of his action or defence. Hence the question is not one of limitation as I said before but is one as to whether the

1. (1912) 10 A. L. J. 227. 2. (1880) I. L. R. 6 C. 394, S. C. L. R. 7 I.A. 240.
3. (1908) L. R. 1 Ch. D. 167.

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enjoyment which is necessary to acquire the prescriptive right has been peaceable enjoyment and enjoyment as an easement without interruption for 20 years or more and all this to end within two years before suit.

Mr. Ganesa Aiyar next contended resourcefully that the enjoyment in the present case could not be considered peaceable (see the first paragraph of S. 15 of the Easements Act) up to *within* two years before suit as there were wordy quarrels from the end of April 1907 when the first defendant purchased the servient tenement till July 1909 when the period of two years before the institution of the suit began. The short question therefore remaining for consideration (assuming that the plaintiff claims his easement right by reason of the statutory prescription) is whether the verbal disputes which caused no interruption to the enjoyment of the easement right claimed by the plaintiff prevented the enjoyment being "peaceable" so as to prevent the acquisition of such prescriptive right.

It is rather curious that there seems to be no clear and sufficient authority on the question whether verbal disputes which do not cause interruption or obstruction to the enjoyment of the easement prevent the enjoyment from being peaceable so that the plaintiff is precluded from relying on such enjoyment as forming part of the 20 years peaceable enjoyment necessary to give him a prescriptive title.

Mr. Ganesa Aiyar based several of his arguments upon the history of the origin of prescriptive rights in English Law. I shall say a few words on that question as they seem to be required to clear the ground of irrelevant matters. There was in the first place the fiction in England that easement rights when they do not really arise from an express grant must be supposed to have originated in some lost grant from the owner of the servient tenement. The very widely differing opinions (about eighteen were received) given by the learned English Judges in the three stages through which the case of *Angus* v. *Dalton* [1] passed show the subtleties and hairsplitting which even the more powerful intellects have to resort to when rights are based upon patently false fictions instead of natural rights. The presumption of a lost grant made in the old English cases is said by Thesiger L. J. in the Court of Appeal to be "not a *presumptio juris et de jure*, that is,

1. (1877) 3 Q. B. D. 85; (1878) 4 Q. B. D. 162; (1881) 6 A. C. 740.

not an absolute and conclusive bar and that the correct view on this point is that the presumption of acquiescence and the fiction of an agreement reduced therefrom in a case, where the enjoyment of an easement has been for a sufficient period uninterrupted, of an easement is in the nature of an estoppel by conduct, which while it is not conclusive so far as to prevent denial of explanation of the conduct, presents a bar to any simple denial of the fact, which is merely the legal inference drawn from the conduct.'' See Peacock on Easements at page 148. Then there are old English cases in which it was said that a legal incompetence as regards the owner of the servient tenement to grant an easement, or a physical incapacity of being instructed as regards the easement itself will prevent the presumption of an easement by lost-grant. Cotton, L. J., said in *Angus* v. *Dalton* [1], that "twenty years" enjoyment does not confer an absolute right but raises a presumption of a modern lost grant *which is not capable of being rebutted by an admission of evidence* that there was in fact no grant, unless supported by additional evidence that the adjoining owner was incapable of making a grant, or by any other rebuttable evidence." In the 6 House of Lords case, not only did the five law lords including the Lord Chancellor Selborne take part at the second hearing but the opinions of seven Judges of the High Court had been invited and forwarded to the House of Lords. Bowen, J., in the course of his opinion (see page 786, 6 Appeal cases) says that enjoyment which is capable of interruption is therefore capable of ripening into a right of easement where such interruption does not occur. Then he adds " it might perhaps be added with some show of reason that the user ought to be neither violent nor contentious. The neighbour, without actual interruption of the user, ought perhaps, on principle, to be enabled by *continuous and unmistakable protests* to destroy its peaceable character, and so to annul one of the conditions upon which the presumption of right is raised." And then he refers to *Eaton* v. *Swansea Water Works Company* [2], though in that case what took place was not a mere verbal protest by the servient owner but actual physical obstruction added to the prosecution and conviction of the servant of the dominant owner for trespass (see the report in English reports Vol. 117 page 1282). The House of Lords

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1. (1877) 3 Q. B. D. 85 ; 1878 4 Q. B. D. 162 ; 1881 6 A. C. 740.
2. (1851) 17 Q. B. 267.

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in *Dalton* v. *Angus* [1] held among other things that *de facto* enjoyment of the easement of support for 20 years raised an absolute presumption in favour of the dominant owner *which cannot be rebutted by proof that a grant had not been made.* To use the language of Peacock in his book on Easements page 413 " In the early part of the nineteenth century, when war was made on all legal fictions and that of a lost grant fell into disfavour, the Legislature determined to remove the blot on the administration of justice which arose from thus forcing the consciences of juries and to substitute a direct for an indirect method of lessening the period of prescription". Then it was that Act 2 and 3 of William IV known as the English Prescription Act and Lord Tenterden's Act was pressed.

In *Arzan* v. *Rakhal Chunder Roy Chowdry* [2], Garth, C. J., refused to follow the view put forward in some English cases as to the necessity of knowledge and acquiesence on the part of the servient owner for the acquisition of a prescriptive easement under the Limitation Act of 1877. If I may say so with respect I entirely agree with him. As regards the question when a statutory prescriptive right has been acquired under the Easements Act, it seems to me neither necessary nor proper to go into the question of lost grants, acquiscence, consent and so on which occupy so much space in the English reports.. I think it cannot be argued that when a man has been openly and adversely and yet peaceably enjoying the easement as of right without interruption for 20 years till two years before date of suit, the fact that the servient owner was a lunatic or was in jail could prevent the acquisition of the title by prescription under the Easements Act.

As regards the meaning of the word "peaceable" I am inclined to hold that it means that the plaintiff who claims to be the dominant owner has neither been obliged to resort to physical force himself at any time to exercise his right within the 20 years expiring within two years of the suit nor had he been prevented by the use of physical force by the defendant in his enjoyment of such right. I do not think that oral oppositions and oral expressions of dissent by the defendant can prevent the enjoyment being peaceable. The word 'contentions' used in some English cases is of very ambiguous significance. Though I have not been able to find any English case where mere verbal contentions (without

1. (1881)6 A.C. 740. 2. (1883) I. L. R. 10 C. 214.

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resort to litigation) have been held to prevent the enjoyment from being peaceable, it seems that in Roman Law the acquisition of prescriptive right will be interrupted even by verbal contentions (see Gale on Easements page 231). Assuming, however, that I am wrong in my above view and that even verbal contentions will prevent the acquisition of a prescriptive right under the Statute Law, that is Act V of 1882, I am quite clear that in this case, the Lower Courts were not justified in reading the plaint as if it claimed the prescriptive right of easement only or even mainly under the Statute Law. There is not a word said about the Easements Act or the Limitation Act in the plaint. The 5th paragraph mentions the use of the path by the plaintiffs and their ancestors for 30 years. The path is called a "mamul" path in paragraph 13 of the plaint. It has been held by the Privy Council in *Rajrup Koer* v. *Abdul Hossain* [1], that a plaintiff need not rely upon the statutory prescriptive right given to him under the Limitation Act of 1871 S. 27 (which corresponds to S. 26 of the later Limitation Acts and to S. 15 of the Easements Act.) As their Lordships state at page 403 "the object of the statute was to make more easy the establishment of rights of this description, by allowing an enjoyment of twenty years, if exercised under the conditions prescribed by the Act to give, without more, a title to easements. *But the statute is remedial, and is neither prohibitory nor exhaustive. A man may acquire a title under it, who has no other right at all, but it does not exclude or interfere with other titles and modes of acquiring easements.* Their Lordships think that, in this case, there is abundant evidence upon the facts found by the courts for presuming the existence of a grant at some distant period of time." That being so, the plaintiff does not require the aid of the statute and his right therefore is not in any degree interfered with by the provision of S. 27 (that is, as to the period ending within the two years before suit upon which the District Munsif relied). Hence it has been held in numerous cases that where open enjoyment has taken place for a long series of years title by prescription was acquired independently of the staute and a suit to establish that right can be brought within twelve years after the obstruction. In a case in *Kurupam Zemindar* v. *Merangi Zemindar* [2] an enjoyment for eighteen years which ceased 7 years before suit was held to give a prescriptive right. I think I am

1. (1880) I. L. R. 6 C. 394. 2. (1882) I.L.R. 5 M. 253.

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bound by the decision in I. L. R. 5 M. 253 which has never been dissented from. See also *Arni Jagirdar* v. *The Secretary of State for India* [1], *Punja Kuvarja* v. *Baikuvar* [2], *Achul Mahta* v. *Rajunmahta* [3] *Keylash Chander Ghose* v. *Sonatum Chung Barooe* [4], *Charu Surnokar* v. *Dokouri Chunder Thakoor* [5], *Arzan* v. *Rakhal Chunder Roy Chaudhri* [6], *Hargovandas Lakshmidas* v. *Bajibhai* [7] and *Eshan Chandra Samanta* v. *Nil Moni Singh* [8].

As in this case more than 20 years enjoyment before 1907 has been proved even assuming the validity of the defendant's contention that the obstruction by word of mouth which took place in 1907 will prevent the acquisition of the statutory right of prescription, an easement by prescription not depending upon the statute had been acquired by the plaintiff before 1907 and the limitation for a suit for the possession of such right is 12 years. If the suit is treated as a suit for declaration and injunction even then the period of limitation would be six years. Hence this suit brought in 1911 was not barred by limitation. I would therefore dismiss the second appeal with costs.

Bakewell, J.

Bakewell, J:—The question in this case is as to the meaning of the words "peaceably and openly enjoyed by any person" in the third paragraph of Section 15 of the Indian Easements Act 1882. The adverbs *peaceably* and *openly* qualified the verb enjoyed and indicate the manner in which the dominant owner must conduct himself in his use or enjoyment of the servient tenement, the conduct of the servient owner is immaterial except so far as it goes to show the nature of the user by the dominant owner. If it be desired to amplify the expression which seems to me to be scarcely necessary, I would paraphrase it as follows "the person who claims a right over the property of another must not have deprived him of that right by the use of force or secretly"; in other words the user must be *Nec vi Nec clam.*

The noise and clamour on the part of the servient owner only go to show to my mind that the user was not secret.

I agree that the appeal should be dismissed with costs.

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1. (1882) I. L. R. 5 M. 226.
2. (1881) I. L. R. 6 B. 20.
3. (1881) I. L. R. 6 C. 812.
4. (1881) I.L.R. 7 C. 132.
5. (1882) I. L. R, 8 C. 956.
6. (1883) I. L. R. 10 C, 214.
7. (1889) I. L. R. 14 B. 223.
8. (1908) I. L. R. 35. C. 851.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Abdur Rahim and Mr. Justice Spencer.

Sillu Pedda Yelligadu ... *Appellant** (*Petitioner*)

v.

Sree Raja Ravu Venkata Kumara Mahipati Surya Rao Bahadur Zamindar Varu and another. *Respondents* (*Respondents.*)

Sillu Pedda Yelligadu *v.* Raja of Pittapur.

Execution—Decree for injunction—Right of easement—Transfer of property by decree-holder to third person—Transferee not on record nor applied for execution—Right of decree holder to execute the decree.

Where a person obtains a decree for injunction in respect of an easement right and subsequently transfers the property to which the right of easement is appurtenant to a third person, so long as there is no transfer of the decree, he (the judgment creditor) is entitled to execute the decree.

Ram Sahai v. *Gaya* [1] foll.

Monmotho Nath Mitter Pal v. *Rakhal Chandra Tewary* [2].

Jasada Deye v. *Kirtibash Das* [3]; *Hansraj Pal* v. *Mukharaji* [4] referred to.

Appeal against the order of the Court of the Subordinate Judge of Cocanada in A. S. No. 91 of 1913 preferred against the order of the Court of the District Munsif of Peddapore in E. P. No. 975 of 1912 in O. S. No. 269 of 1908 (Appeal Suit No. 47 of 1912 on the file of the Court of the Temporary Subordinate Judge of Rajahmundry.

P. Narayanamurti for Appellant.

K. Rajah Aiyar for S. Srinivasa Aiyangar and *D. Appa Rao* for Respondents.

The Court delivered the following

Judgment:—This is an appeal against the order of the Lower Appellate Court setting aside a portion of the order of the Court of the First Instance. The Lower Appellate Court disallowed execution of the decree so far as injunction against the Judgment-debtor was concerned on the ground that the property to which the right of easement was attached had been subsequently transferred by the decree-holder to a third person. The transferee has not appeared and is not on the record of the case nor has he applied for permission to execute the decree. So far as the record goes, the Judgment-creditor is the decree-holder and is therefore *prima facie* entitled to execute the decree. It may be that the land having been sold, the decree-holder is not entitled to the enjoyment of the easement, but, that is a question which it is

*C. M. S. A. 60 of 1914. 27th September 1915.

1. (1885) I. L. R., 7 A. 107.
2. (1909) 10 C. L. J. 396.
3. (1891) I. L. R., 18 C. 639.
4. (1907) I. L. R. 30 A 28, s.c. 4 A.L.J. 759.

Jillu Pedda Yelligadu v. Raja of Pittapur.

not competent for a court executing the decree to deal with in the circumstances of this case. It is bound to allow execution at the instance of the decree-holder as there was no other person who had the right to execute the decree.

The ruling reported in *Ram Sahai* v. *Gaya* [1], is very much to the point. There the decree-holder had sold the property which gave rise to a right of pre-emption and the contention was raised that the property having been sold the decree could not be executed at the instance of the decree-holder. That contention was disallowed on the ground that the executing court was bound to recognise the decree-holder on record. There are a number of other decisions which follow the principle laid down there. See *Monmotho Nath Mitter v. Rakhal Chandra Tewary* [2], *Jasada Deye* v. *Kirtibash Das* [3], and *Hansraj Pal v. Mukharaji Kunwar* [4]. The appeal should be allowed. The Lower Appellate Court's order is therefore set aside and the District Munsiff's order restored. The respondent must pay the costs of the Appellant in this and the Lower Appellate Court.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Ayling and Mr. Justice Tyabji.

K. R. Manickam Mudaliar ... *Appellant* (Plaintiff)*

v.

Kummalunguttay Munusami Naidu ... *Respondent (Defendants.)*

Manickam Mudaliar v. Munusami Naidu.

Malicious Prosecution—Intervention of some other person as prosecutor—Immaterial—Causing or procuring.

If a person causes or procures another to be prosecuted he is liable notwithstanding the intervention of some other person as the direct or technical prosecutor and it makes no difference whether the other person is or is not an officer of the law.

Where, however, it was found that though on a statement made by the defendant to the official superior of the plaintiff, plaintiff was prosecuted the defendant was unwilling to complain against the plaintiff, that he made his statement more or less under compulsion, that the plaintiff was already suspected by his official superior and that the Government without any further interference on the part of the defendant beyond the statement made by him directed the prosecution of the plaintiff.

Held, that on these facts the defendant could not be held to be the person who set the law in motion against the plaintiff so as to be liable for malicious prosecution.

The facts of the case are shortly these:

The plaintiff is a dismissed Forest Ranger. He was in charge of Vellore Range in North Arcot District and was prosecuted for

* S. A. No. 2557 of 1913. 16th September 1915.

1. (1884) I. L. R., 7 A. 107.
2. (1909) 10 C. L. J. 396.
3. (1891) I. L. R., 18 C. 689.
4. (1907) I. L. R., 30 A. 28.

offences under Ss. 409 and 218 in connection with an auction-sale of sandalwood which he conducted and was acquitted by the Sessions Judge. Defendant who is a contractor was one of the bidders at the sale. Plaintiff's case was that he was charged at the instance of the defendant who made a complaint to the District Forest Officer and that defendant was in fact the real prosecutor. The Sub-Judge found that plaintiff was not prosecuted by the defendant and that consequently there was no cause of action and dismissed the suit. The District Judge on appeal agreeing with the Subordinate Judge confirmed the decree.

Second appeal against the decree of the District Judge (Mr. L. G. Moore) of North Arcot in A. S. No. 175 of 1913 preferred against the decree of the Court of the Subordinate Judge (Mr. K. Krishnamachariar) of North Arcot in O.S. No. 74 of 1911.

C. Narasimha Chariar for appellant.

L. A. Govindaraghava Aiyar and *L. A. Venkataraghava Aiyar* for respondent.

The Court delivered the following

Judgment:—This appeal arises out of a suit for damages for malicious prosecution.

The question in the present case is whether the defendant "was directly responsible for any charge at all being made against the plaintiff". *Gaya Prasad* v. *Bhagat Singh* [1]. Persons who had made the original report of the alleged offence knowing it to be false, have been made by the Privy Council to "abide the consequences of their misconduct" notwithstanding that the "prosecution was not technically conducted by them", but by the Police.

The facts in *Gaya Prasad* v. *Bhagat Singh* [1] were that the Sub-Inspector instituted the charge at the instigation of the defendants and not of his own motion (p. 533) and the defendants had concocted and produced false evidence to get the plaintiff charged with the crime (page. 532).

The instigation to prosecute apparently consisted in making the original report upon which the prosecution was ultimately based, and in giving a list of the persons containing the plaintiff's name and saying that the chief cause of the riot was the plaintiff. In the conduct of the case the defendants took the principal part both before the Police and in the Magistrate's Court and instructed the prosecution counsel that the plaintiff joined the riot—which the

1. (1908) I. L. R. 30 A. 525, 535.

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Magistrate found had never taken place; moreover on the day of the alleged riot the plaintiff was ill at Lucknow.

The Privy Council mention two alternative cases, in one of which they say it would be improper to make the defendant responsible in damages for failure of the prosecution, and in the other that it would be equally improper to allow him to escape, (Pp. 533-4.) The present defendant does not come under either of these categories. For on the allegations, which have not been investigated so far, but which we must for the present purposes assume to be true, (1) he certainly went beyond giving what he believed to be correct information; but, on the other hand, (2) it has been found that he did not bring suborned witnesses to support the charge, nor did he influence the police or any one else to assist him in sending an innocent man for trial.

It does not follow that when a person does not come within the terms of the second alternative he must necessarily succeed in a suit against him for malicious prosecution any more than it follows that if he fails to satisfy the first alternative, the suit must necessarily be decreed. For as already stated, the ultimate question as laid down by the Privy Council, is whether the defendant was directly responsible for the charge being brought against the plaintiff. In this connection it is necessary to refer to two matters: (1) A person may be directly responsible for the proceedings, notwithstanding that he may not have originally contemplated prosecution as the result of his acts or statements, and have been required by the Court to prosecute the plaintiff, *Fitzjohn* v. *Mackinder* [1] (Cf. at p. 512 per Blackburn, J.), and notwithstanding that the proceedings may be of such a special character as to require the intervention of the Political officers of the Government with which the defendant may not have any direct connection, much less any control, over it: Cf. *Musa Yakub* v. *Manilal* [2] (where extradition proceedings were held to be part of the cause of action in a suit for malicious prosecution). The safeguard for the defendant in such cases is that probably he would succeed in proving that he had no malice: *Fitzjohn* v. *Mackinder* [3]: "the recognizance would then furnish an answer" in the words of Littledale, J., "for this reason only, that in such a case the plaintiff could not prove that the defendant was actuated by the malicious motive in making his charge before the Magistrate." 11 A and

1. (1861) 9 C. B. N. S 505 (Ch.) at 512. 2. (1904) I. L. R. 29 B. 368.
3. (1861) 9. C. B. N. S. 505 at 524

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E 329. (2). On the other hand it is clear that the mere giving of false evidence does not make the perjured witness liable to civil action *Revis* v. *Smith* [1] and *Henderson* v. *Broomhead* [2]. Such an action would be not for malicious prosecution, but for damages for defamation : *Dubois* v. *Keats* [3]: and it does not lie because that the occasion is absolutely previleged ; the reason being that if this action could be maintained it would tend very much to discourage witnesses from giving evidence by fear of infinite vexation". 4 H. and N. 569—Cf. also *Allen* v. *Flood* [4] (per Lords Herschell and Davey).

The Subordinate Judge was therefore wrong in considering that inasmuch as the defendant gave information in the first instance not to " an officer of the law ", but to the forest officer, the suit cannot lie. If the defendant causes or procures the plaintiff to be prosecuted, he is liable notwithstanding the intervention of some other person as the direct or technical prosecutor ; it can make no difference whether the other person is or is not an officer of the law.

The District Judge however after holding that the defendant did not come within the second of the two categories mentioned by the Privy Council, also finds that the defendant was unwilling to complain against the plaintiff, that he made his statement to the Joint Magistrate more or less under compulsion, that the plaintiff was probably already suspected by his official superior, and that the Government resolved to prosecute the plaintiff without any further interference on the part of the defendant beyond the statement made by him to the plaintiff's official superior.

The argument for the appellant is that on these facts on the authority of *Fitzjohn* v. *Mackinder* [5], the defendant ought to be held liable. It is unnecessary to decide whether the defendant would have been liable if the prosecution had been caused (eventhough not intentionally) by the defendant's statement to the plaintiff's official superior ; and if his had been the only substantial evidence for the prosecution or if the main part of the other evidence had been procured or suborned by him. In such a case it may be—we do not decide it—that the defendant is responsible for the prosecution though it has been conducted in

1. (1856) 18 C. B. 126 s. c. 25 L. J. Ex. 360.
2. (1859) 4 H. and N. 569 s.c. 28 L.J.C.P. 195.
3. (1840) 11 A. and E. 329.
4. (1898) A. C. I. 125, 172.
5. (1861) 9 C. B. N. S, 505.

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the name of some other person and even though the Court or some other person has directed that the plaintiff should be prosecuted. Nor can it be considered in the present case whether the statement made by the defendant to the plaintiff's official superior would have made him liable to a suit for defamation; the present suit is not so framed, and the issues in a suit for defamation would have been entirely different though it may be (as pointed out by Lords Herschell and Davey 1898 A. C. 1) that on principle the two classes of suit are connected.

It is thus clear that the present suit can be supported (if at all) only on the contention that the statement in question shows that it was the defendant who set the law in motion against the plaintiff. The District Judges's findings clearly negative this view; and when the circumstances are considered in the light of the authorities to which we have referred there is no doubt that the result at which he arrived was perfectly correct.

The appeal is therefore dismissed with costs.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Sadasiva Aiyar and Mr. Justice Napier.

Gnanambal Ammal ... ... *Appellant** *(Plaintiff)*

v.

Veerasami Chetty and others ... *Respondents* *(Defendants).*

Gnanambal Ammal v. Veerasami Chetty.

Civil Procedure Code S. 2 Cl. (11)—Decree against widow in possession and illegitimate son—Ignorance of will—Sale in execution—Binding against legatee —Executor de son tort—Old Code and new, no difference.

Where a creditor of the estate ignorant of the true state of affairs, sued the widow in possession and the illegitmate son who would have been the legal representatives but for a will left by the debtor under which the 1st defendant was constituted executor and the plaintiff a legatee and obtained a decree and in execution, the property in possession of the widow was purchased by a stranger.

Held, that the sale was binding against the plaintiff.

General Manager Dhurbunga Raj v. *Rampat Singh* [1] followed.

Per Sadasiva Aiyar, J.—The rule enacted in S. 2 cl. (11) C. P. C. is not new and held good even under the old Code.

Siva Bhagiam v. *Palani Padayachi* [2] dissented from.

Second Appeal against the decree of the Court of the Subordinate Judge of Mayavaram in A. S. No. 622 of 1912, preferred against the decree of the Court of the District Munsif of Tiruvalur in O. S. No. 311 of 1911.

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* S. A. 2613 of 1913. 25th October 1915.

1. 14 M. I. A. 605. 2. I. L. R. 4 M. 401.

Gnanambal Ammal v. Veerasami Chetty.

The facts are fully stated in this Judgment.

G. S. Ramachandra Aiyar for appellant.

I submit that the plaintiff is entitled to the suit property. There was no valid representation of the estate of Narayanaswami Chetti in S.C. Suit 1068 of 1899 and the proceedings in execution of the decree therein. The 1st defendant who was an executor under the will of Narayanaswami Chetti, was not a party to the suit. Under the Hindu Wills Act and the Probate and Administration Act, the executor, as such, is the legal representative of the deceased and statutory owner of his property. See Mayne's Hindu Law, 8th Edition pp. 593,594. The same principle is applicable even in cases not coming directly within the scope of the aforesaid Acts.

The present plaintiff was not a party to the Small Cause Suit and her interest could not have been validly sold in execution of the decree therein. Even if the decree in the Small Cause Suit was binding against the estate in the hands of the 3rd defendant who was a party to that suit, it is not binding on the plaintiff or on the property which she took under the will. The plaintiff in the Small Cause Suit ought to have impleaded the present plaintiff, if he wanted to proceed against the estate in the hands of the latter. If the plaintiff in the Small Cause Suit had impleaded a wrong legal representative, the true legal representative is not liable under the decree. *Subbanna* v. *Venkatakrishnan* [1], *Siva Bhagiam* v. *Palani Padayachi* [2], *Kalliappan Servaikaran* v. *Varadarajalu* [3], *Ashi Bhusan* v. *Pelaram* [4], *Harishchandra* v. *Puridas* [5], *Lalbehari* v. *Nagendra Nath* [6], *Kalicharan* v. *Sukhada Sundari* [7].

[*Sadasiva Aiyar, J* :—Are the creditors of a deceased person liable to have their claims defeated by the trick of keeping secret the existence of a will till their claims are barred by limitation ?]

There is no hardship. Even if the creditors have obtained a judgment with the wrong representatives on record, they can bring a fresh suit on the judgment against the proper legal representatives. See Art. 122 of the Limitation Act. *Kalicharan* v.

1. (1888) I. L. R. 11 M. 408.
2. (1882) I. L. R. 4 M. 401.
3. (1909) I. L. R. 33 M. 75=19 M. L. J. 651.
4. (1913) 18 C. L. J. 362.
5. (1910) 12 C. L. J. 561.
6. (1912) 22 C. L. J. 266.
7. (1915) 22 C. L. J. 272.

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Sukhada Sundari [1], lays down the remedies open in such a case: In *Ramasami* v. *Oppilamani* [2], the question arose in execution ; here the suit is filed against the wrong person.

T. V. Muthukrishna Iyer for the Respondents. The Small Cause Suit was brought against the person in possession of the estate. There was no fraud or collusion. In such a case, I submit, the decree is binding on the estate.

[*Sadasiva Aiyar, J.* :—The definition of "legal representative" in S. 2 cl. (11) Civil Procedure Code supports your contention.]

Yes. See *General Manager* v. *Ramphat Singh* [3]. I rely on *Prosunno Chunder* v. *Kristo Chytunno* [4], and the principle underlying *Ramasami* v. *Oppilamani* [2].

The Court delivered the following

Sadasiva Aiyar, J.

Judgments :—*Sadasiva Aiyar, J.* The plaintiff is the appellant. Her paternal uncle Narayanasawmi Chetti died in March 1899 leaving a will dated May 1898. Under the terms of that will, the plaint lands (11 and odd acres) were given to the plaintiff and to the plaintiff's mother (the 2nd defendant). The plaintiff was to take 4 acres 36 cents absolutely and the 2nd defendant to take the remaining 6 acres 65 cents for life with reversion to the plaintiff. Narayanasawmi Chetty also left a widow, the third defendant, to whom other properties were left by his will. He owed money at his death to one B. M. Marakayar. That creditor not knowing the existence of the will and having to bring his suit for the debt before it was barred, filed Small Cause Suit No. 1068 of 1899 soon after the death of Narayanasami Chetty treating his widow (the 3rd defendant) and his illegitmate son as the heirs and legal representatives of Narayanasawmi Chetty. He also found that the 3rd defendant was in possession of the plaint item 2 (7 acres and 74 cents). He obtained a decree and in execution brought item 2 to sale and at that sale the 5th defendant became the purchaser in 1901 and obtained possession as such court auction-purchaser in July 1901 ejecting the 3rd defendant.

The executor mentioned in the will (of Narayanasawmi Chetty) who is the 1st defendant in this suit, took no steps till 1903 to administer the will or to get possession of Narayanasawmi Chetty's properties as executor. The plaintiff has brought this suit as the legatee under the will of Narayanasawmi Chetty to

1. (1915) 22 C. L. J. 172.
2. (1909) I. L. R. 33 M. 6=19 M. L. J. 671.
3. (1872) 14 M. I. A. 605.
4. (1878) I. L. R. 4 C. 342.

recover 4 acres 36 cents out of the plaint 11 acres 1 cent and her contention is that the decree obtained by the Marakayar creditor against the estate of Narayanasawmi Chetty in a suit to which neither the plaintiff nor the executor (1st defendant) was made a party-defendant was not binding on her or the estate and that the sale proceedings held in execution of that decree conveyed no title to the purchaser (5th defendant).

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It is unnecessary to consider the plaintiff's claim to plaint item 1 as her dispute with the 4th defendant in respect of that item was abandoned (by a compromise) in the Court of First Instance. Both the Lower Courts dismissed the suit as against the 5th defendant and the plaint item No. 2 in his possession on the ground that the decree of 1899 obtained by the creditor against the 3rd defendant (and against the testator's illegitmate son) and the execution proceedings in that suit were binding on the estate of the deceased and therefore on the plaintiff and on the 1st defendant.

Mr. G. S. Ramachandra Aiyar contended on the authority of *Kaliappan Servaikaran* v. *Varadarajulu* [1] that where a wrong person was impleaded as legal representative of a deceased debtor in a suit brought after the death of the debtor, execution could not validly issue against the properties which had vested in the proper legal representative and that the proper legal representatives in this case as regards the plaint item No. 2 were the legatees under the will, namely, the plaintiff and the 2nd defendant. At least, that was how I understood the learned Vakil's argument at the commencement of this case. However, during the course of the argument, S. 4 of the Probate and Administration Act came under discussion, that section stating that the "executor of a deceased person is his legal representative for all purposes, and all the property of the deceased person vests in him as such." Mr. G. S. Ramachandra Iyer thereupon argued that as the executor, 1st defendant, was not made a party to Small Cause Suit of 1899, the execution taken out against the plaint properties conveyed no title to the purchaser.

It is unnecessary for me to express a final opinion on the question decided in *Kaliappan Servaikaran* v. *Varadarajulu* [1]. What was decided in that case was that the true legal representative cannot, after the decree, be brought on the record

1. (1909) I. L. R. 33 Mad. 75 s. c. 19 M. L. J. 651.

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for the purpose of execution and, that the deceased debtor's property *in his hands* cannot be attached and sold in that same suit. In *Kali Charan* v. *Sukhada Sundari* [1] Mookerjee, J., decided a similar case to that in *Kalippan Servaikaran* v. *Varadarajulu* [2] on similar reasons and held that the remedy of the decree-holder who had obtained a decree against the wrong legal representative is "either to have the decree vacated, the suit restored" and the proper legal representative brought on the record and a new decree made against him "or to institute a suit on the judgment and to obtain a decree thereon against" the true legal representative and then to execute the new decree against the property which had vested in the true legal representative. As regards these two cases, it seems to me with the greatest respect that they do not give sufficient weight to the observations of their Lordships of the Privy Council in several cases that decree-holders and purchasers in court-auction should not be deprived of their legitimate rights on bare technicalities where the merits are clearly in their favour. In *General Manager of the Raj Durbhanga* v. *Maharajah Coomar Ramput Singh* [3] their Lordships said "These proceedings certainly illustrate what was said by Mr. Doyne and what has been often stated before, that the difficulties of a litigant in India begin when he has obtained a, decree." In that case, A obtained a decree against B's widow, B having died pending the suit. The interest of the widow was sold in execution. The contention of the respondent was that the widow did not represent the estate as the deceased debtor had left a son. Their Lordships however, held that the estate itself, that is the right of the deceased debtor in the property was properly sold as that was intended to be sold and the proceedings had all been conducted *bona fide*. Mr. G. S. Ramachandra Aiyar, however, distinguished the present case and the case of *Kaliappan Servaikaran* v. *Varadarajuloo* [2] from the Privy Council case and other similar cases on the ground that where the debtor's wrong representative was sued *in the first instance*. (and was not brought in as a legal representative owing to the debtor's dying during the pendency of the suit), the sale of the deceased debtor's property in execution will not pass the debtor's interests. As I said before *Kaliappan Servaikaran* v. *Varadrajulu* [2] decided

1. (1915) 22 C. L. J. 272.
2. (1909) I. L. R. 33 M. 75 s. c. 19 M.L.J. 651.
3. (1872) 14 M. I. A. 605 at 612.

only that execution proceedings, if objected to by the right representative who had not been made a party to the suit before decree, should be dismissed and not that if the wrong representative had been *bona fide* added or sued and a decree had been obtained and the property of the deceased had been brought to sale, the sale itself was invalid, and could not affect the estate of the deceased. In that same volume (*Ramasawmi Chettiar* v. *Oppilamani Chetty*[1] a case is reported which was argued by eminent Vakils on both sides and it was held therein that a decree-holder may select from among several rival claimants to the estate of his judgment-debtor any one whom he believes honestly to have the best *prima facie* title as legal representative and that that representation in the absence of fraud or collusion will be sufficient to validate sales held in execution and to convey the title of the deceased judgment-debtor through such sales. The broad principle of the decision in that case clearly seems to me to apply to the present case.

I would further remark that under the definition of "legal representative" in the new Civil Procedure Code of 1908, the 3rd defendant might be properly treated till 1901 as the proper legal representative of her husband Narayanaswami Chetty so far as the plaint item No. 2 is concerned and could be sued as such legal representative so as to obtain a decree against her in order to make item No. 2 validly liable for the satisfaction of the decree debt. S. 2 cl. 11 Civil Procedure Code says that "legal representative" includes any persen who intermeddles with the estate of the deceased.

Taking it that the first defendant was also a proper legal representative as the person in whom the estate legally vested, the 3rd defendant who was in possession of item No. 2 and therefore intermeddled with the estate can likewise be treated as the "legal representative" of Narayanasawmi Chetty, till she lost possession of item No. 2 in consequence of the delivery proceedings in 5th defendant's favour. No doubt, the definition of "legal representative" in the Act of 1908 was not found in the old Civil Procedure Code. But it seems to me that the definition is based on sound legal principles which were applicable even before the new code was enacted. As regards the case in *Siva Bhagiam* v. *Palani Padayachi* [2], it was doubtless held in

1. (1909) I. L. R. 33 M. 6 s. c. 19 M. L. J. 671.
2. (1882) I. L. R. 4 M. 401.

Gnanambal Ammal v. Veerasami Chetty. — Sadasiva Aiyar, J.

that case that a person who was in possession of the deceased's estate and who was sued as his legal representative could not validly represent the estate so as to pass a valid title to the court auction-purchaser who purchased the property in her hands in execution of the decree passed against her as such legal representative. With the greatest respect, I dissent from that ruling and I think it must be taken as impliedly overruled by the decision in *Ramaswami Chettiar* v. *Oppilamani Chetty* [1].

In the result I would to dismiss the Second Appeal with costs.

Napier, J.

Napier, J:—I agree. This case seems to me to be covered by the decision in *General Manager of the Raj Dharbanga* v. *Maharajah Coomar Ramput Singh* [2] it being a suit against the estate of the deceased.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Ayling and Mr. Justice Seshagiri Aiyar, JJ.

The firm of K. E. P. T. V. Draviam Pillai and Venkatachelam Pillai of Tuticorin. *Appellants* * (*Plaintiffs*).

v.

Cruz Fernandez and another ... *Respondents* (*Defendants.*)

Draviam Pillai v. Cruz Fernandez.

Madras—District Municipalities Act (*IV of* 1884), *S.* 250 (*a*)—*Rules framed thereunder—Election—Refusal of Chairman to register name of certain person as entitled to vote on behalf of a firm—Damages for improper refusal—Absence of* bona fides—*Malice if necessary.*

The Chairman of a Municipality will be liable in damages if he refuses to register the name of a person as entitled to vote on behalf of a firm if the refusal is not in good faith which implies due care and diligence. Express malice is not necessary.

A summary dismissal of a petition presented for the registry of the name of a person as a voter is illegal and is not consistent with *bona fides* on the part of the officer.

The nomination of a representative does not necessarily constitute an amendment of the register of voters.

Second Appeal against the decree of the District Court of Tinnevelly in A. S. No. 181 of 1912, preferred against the decree of the Court of District Munsif of Tuticorin in O. S. No. 28 of 1911.

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* S. A. No. 731 of 1913. 22nd September 1915.

1. (1909) I. L. R. 33 M. 6.
2. (1872) 14 M. I. A. 605.

Draviam Pillai v. Cruz Fernandez.

T. R. Ramachandra Aiyar with *V. S. Govindachariar* and *V. S. Kallabiram Aiyangar* for Appellants.

J. L. Rosario with *K.V. Krishnaswami Aiyar and C. Krishnamachariar* for Respondents.

The Court delivered the following

Judgment:—The facts of this case are very simple. Plaintiffs are the firm of K. E. P. T. V. Draviyam Pillai and Venkatachallam Pillai. They are registered in the voting Register of the Tuticorin Municipality as "K. E. P. T. V. Draviyam Pillai and another." Note (1) to Rule 4 of the Rules promulgated by Government under section 250 (1) (a) of the District Municipalities Act provides that a firm desirous of voting "when entitled to be registered must cause the name of a partner, member, agent or secretary to be entered in the register maintained under Rule 3 supra as their representative, and he alone shall be entitled to vote on behalf of the company or family." This rule has been interpreted in G. O. No 2020 M. Dated 27th September 1905 as follows:—"It is the duty of the Chairman to see that proper representatives for purposes of voting are registered by the companies, associations and undivided families entitled to such privileges and brought on the register of voters at the time of its preparation."

(2) There is however no objection to the registration of the representatives of these bodies or to modifications of such registration under the note 1 to Rule 4 at any time during the year. The nomination of a representative does not necessarily constitute an amendment of the register of voters, but is merely by way of subsidiary instruction which is essential to make the accepted list effective."

A Municipal election was held in Tuticorin on 6—10—10. On the previous day the following petition was presented to the chairman (1st defendant): (Exhibit N.)

"The petition written by K. E. P. T. V. Draviyam Pillai of the said place is as follows:—

"We request that Venkatachallam Pillai would be accepted as a representative of us two and that his name be registered in the voter's Register of the 5th ward."

The following order was passed on this by the 1st defendant apparently early on the following day (6-10-1910):—

"Rejected...... The names of both the persons mentioned in this do not appear in the voter's list."

Draviam Pillai v. Cruz Fernandez.

When Venkatachallam Pillai presented himself on that day at the pelling booth, 2nd defendant who was the identifying officer referred him to this order and refused to allow him to vote. He therefore did not vote. The firm now sue for Rs. 1,000/— damages.

That the order of the 1st defendant on Ex. N. was not justifiable is admitted by the District Judge. He says:

"There can, I think, be no doubt that under the rules 1st defendant had power to allow Venkatachellam Pillai to vote as the firm's representative. The description in the list, however ambiguous, could have been modified by him and no reason is shown why he did not modify it and allow Venkatchellam Pillai's vote. I must therefore hold that he exercised his discretion wrongly in disallowing the Vote." He has however dismissed the suit holding on the supposed authority of *Chuni Lal* v. *Kripa Shankar* [1], that *malice*, meaning presumably "express malice", is necessary to sustain the action and that such malice is not proved.

In our opinion the word "malice" which occurs in the penultimate sentence of the reported Judgment in that case means nothing more than a lack of *bona fides*. The learned Judges merely lay down that an officer in a position of this kind "is not liable to a suit because he made a mistake *in good faith* in determining questions that arose for his decision." (Vide also *Sabhapat Singh* v. *Abdul Gaffur* [2]). The real test is whether 1st defendant when he passed his order was acting 'in good faith,' which implies "due care and diligence."

Viewed from this standpoint, we find it impossible to exonerate the 1st defendant. The grounds on which he seeks to justify his action are these as set out in paragraph 6 of his written statement: "Under these circumstances, as in the suit petition which was received by defendant on 6—10—10, it was requested that the name of Venkatachellam Pillai, an individual not found in the said list may be newly entered therein as the representative of two persons named in the petition, and as in the said petition the name of the particular firm of which that individual was required to be registered as the representative was not clearly described and as it was not clear that the voter numbered as 136 was the said identical firm under the name K. E. P. T. V. or if it referred to the two individuals named in

1. (1906) I. L. R. 31 B. 37. 2. (1896) I. L. R. 24 C. 107 at p. 114.

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the suit petition and as an objection petition had been received in connection with vote No. 136, the defendant reasonably surmised that he had no authority to grant an order in compliance with the petition and in accordance with law and mamool, and to the best of his discretion rightly, and with *bona fide* intentions the defendant came to be of opinion that it could not be registered as requested in the petition and in pursuance of this opinion the endorsement on the suit petition was made."

Now as regards this it may be observed (1) that the 1st defendant, as chairman, was himself responsible for the ambiguous entry of "Draviyam Pillai and another" in the voting register; (2) that if he entertained any doubt of the identity of Venkatachellam Pillai with the person entered as 'another' it was easy and his plain duty was to hold an enquiry, (3) that in a precisely similar case, a firm was allowed to record a vote by a representative, although the names of all the partners were not specified in the voting register (Vide paragraph 16 of the District Munsif's judgment), and (4) that the mere presentation of an objection petition by some one else could not possibly be an excuse for denying to plaintiffs their right of voting or at any rate, for refusing to enquire into whether they did not possess such a right. His learned vakil has suggested that the G. O. above referred to has no legal effect and that it is doubtful if the chairman has power to enter the name of the representative in the register except at the time of its preparation or revision. We see no reason to put a different interpretation on the rule than that set forth in the Government order. But however this may be, the 1st defendant never pleaded that his action was in any way influenced by doubts on this score, and this argument cannot be considered in judging of his good faith. In our opinion the 1st defendant was not acting in good faith in rejecting the petition, Exhibit N; and he is liable in damages. We see no reason to call for a finding from the Lower Appellate Court as to the amount, as there is no basis for assessment; and we agree with the District Munsif that the plaintiffs are only entitled to nominal damages.

The decrees of the Lower Courts will be set aside and the plaintiffs will be given a decree for Rs. 50 damages and full costs throughout against the 1st defendant only. Plaintiffs seek for no remedy in this Court against the 2nd defendant who is exonerated; but we make no order as to his costs.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Sadasiva Aiyar and Mr. Justice Napier.

Dharmaraja Aiyar and another ... *Petitioner* (Respondents 1 and 2 in appeal) Defendants 9 and 10.*

v.

K. G. Srinivasa Mudaliar and others. *Respondents (Respondents 1 to 3 are petitioners in the Lower Appellate Court and Respondents 4 and 5 are Respondents 3 and 4 in the Appellate Court and Plaintiffs 1 and 2 in the Court of 1st Instance.)*

Dharmaraja Aiyar v. Srinivasa Mudaliar.

Civil Procedure Code O. 34 R. 8—Power exercisable only by Court of First Instance—Appeal—S 148—Not applicable to extensions of time for doing acts allowed by decrees.

S. 148, Civil Procedure Code, does not apply to the extension of time for doing acts allowed by decrees and the Court has no power under that section to extend the time fixed for the payment of mortgage money by the decree.

Power conferred by O. 34 R. 8 to extend the time fixed for redemption can be exercised only by the court of the 1st Instance and not by the Appellate Court even in cases where the preliminary decree is one made by the Appellate Court.

No appeal lies against an order extending time for payment of the mortgage amount.

Petition under S. 115 of Act V of 1908 praying the High Court to revise the order of the Court of the Subordinate Judge of Kumbakonam in O. P. No. 927 of 1912 in A. S. No. 653 of 1909 (O. S. No. 136 of 1908 on the file of the Court of the District Munsif of Mannargudi).

S. Varadachariar for *T. R. Venkatarama Sastri* for Appellants.

G. S. Ramachandra Aiyar for Respondents.

The Court delivered the following

Judgment:—There is a preliminary objection taken that no appeal lies against the order of the Lower Court extending the time for payment of the mortgage amount, an order passed under the proviso to O. 34, R. 8, and under S. 148 of the Civil Procedure Code. (As regards that portion of the order of the Lower Court which effected an addition of parties under Order 22 Rules 10 and 11, we were told that this appeal was not directed against that portion).

* C. R. P. No. 711 of 1915. 22nd September 1915.

Dharmaraja Aiyar v. Srinivasa Mudaliar.

We think that the preliminary objection is sound. The Order extending time does not come within the definition of a decree (See S. 2 cl. 2 of the Civil Procedure Code). We are clear that it does not determine any question coming within S. 47 as was ingeniously contended by the appellant's learned Vakil, Mr. S. Varadachariar.

We, however, allow this appeal to be converted into a revision petition under S. 115 C. P. C.

The question for consideration on this footing will be whether an Appellate Court which passed the preliminary decree in a mortgage suit (which was treated as a combined suit for redemption, as regards a prior mortgagee and for sale, as regards the mortgagor) has jurisdiction to entertain an application for extension of time under Order 34 Rule 8 Proviso and S. 148.

As regards S. 148, we concur with the decisions in *Het Singh* v. *Tika Ram* [1] and *Suranjan Singh* v. *Ram Bahal Lal* [2] that the section does not apply to the extension of time for doing acts allowed by decrees.

As regards Order 34, Rule 8, we agree with the cases in *Venkatakrishna Aiyar* v. *Thiagaraya Chetti* [3], *Sheonarain* v. *Chunni Lal* [4] *Ram Dhani Sahu* v. *Lalit Singh* [5] and *Shamuldhun Dutt* v. *Lakhimani Debi* [6], that it is the court of First Instance to which the suit was remitted after the preliminary decree was passed by the Appellate Court which has the exclusive jurisdiction to deal with an application under Order 34 Rule 8, proviso. Section 37 quoted by the respondents' learned Vakil has no relevancy as Order 34 Rule 8 proviso does not contain the expression "Court which passed a decree" or "words to that effect," but only the one word "Court". occurring in that expression. But it is argued that the word "Court" means from the context in the former portions of that R. 8, only the "Courts which" (actually) "passed the decree" even if that court be the Appellate Court. But even if the word "Court" has that meaning in the former portions, we do not see that the single word "Court" constitutes the expression "Court which passed a decree" or "words to that effect" when that single word is not followed by any words corresponding to words "which passed a decree." The said word "Court" in the clauses 1, 2 and 4 of that Rule 8 which relates to the

1. (1912) 9 A.L.J. 381.
2. (1912) 17 Ind. Cas. 912; 10 A.L J 250.
3. (1899) I.L.R. 23 M. 521.
4. (1900) I. L. R. 23 All. 88.
5. (1909) I. L. R. 31 All. 328.
6. (1910) 13 C. L. J. 459.

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passing of final decrees in mortgage suits, would, no doubt, *mean* the same thing as the expression "Court which passed a decree," when the court which passed a preliminary decree was (as it would ordinarily be) the court of First Instance. But to argue therefore that the word *must* mean in all cases "the court which passed the decree" even if that court was the appellate court and not the court of First Instance and that therefore the word "Court" in the proviso also means only the appellate court if that is the court which passed the decree and does *not* include the court of First Instance except by a reference to S. 37 seems merely to beg the question in issue.

Further S. 37 includes the court of First Instance only where proceedings have to be taken "*in relation to the execution of decrees*" in certain contingencies. The application now in question does not, in the first place, relate to the execution of any decree and, in the second place, the decree-holder seeks, not to include the court of First Instance on the strength of section 37 but to either include or to mean only the appellate court.

In the result we allow the revision petition and direct the sub-court to return the petition so far as it prays for an extension of time, to be presented to the court of First Instance. Costs hitherto will abide. A fair copy of the petition might be attached to the original petition (which is really a combination of two separate petitions) when the latter is represented to the Court of First Instance the words "may be pleased to add them as plaintiffs 3, 4, and 5" being omitted from the fair copy, attached.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Sir John Wallis, *Kt.*, Chief Justice and Mr. Justice Seshagiri Aiyar.

Karuturi Gopalan, being minor by his maternal grandfather's younger brother Abburi Venkarayudu and others. ... *Appellants* 1st and 2nd (Defendants Plaintiff)*

v.

Karuturi Venkataraghavalu and others ... *Respondents (Plaintiffs Defendants.)*

Karuturi Gopalan v. Karuturi Venkataraghavalu.

Hindu Law—Inheritance—Sudras—Share of adopted son in competition with aurasa son—Partition decree—Provision for marriage expenses

Under Hindu Law even among Sudras the adopted son in competition with a subsequently born aurasa son is entitled to only one fifth of the estate.

* A. S. 98, 107 and 158 of 1913. 6th September 1915.

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Rajah v. *Subbaraya*[1] not followed.

In partition decrees provision can be made for the marriage expenses of the unmarried members of the family. Such a provision should be made only for persons who are of the same degree of relationship as those who have been married at the expense of the family.

Srinivasa Iyengar v. *Thiruvengada Iyengar*[2] followed.

Appeal against the decree of the Court of the Temporary Subordinate Judge of Rajahmundry in O. S. No. 41 of 1911.

V. Rama Doss for Appellants.

P. Narayanamurthi with *B. Narasimha Rao* for Respondents.

The Court delivered the following

Seshagiri Aiyar, J.

Judgments :—*Seshagiri Aiyar, J.*—In *A. S. No. 98 of 1913*. One Venkanna adopted the plaintiff in 1898. The 1st defendant was subsequently born. Venkanna died in 1902. The 2nd defendant, the natural mother of the 1st defendant and the adoptive mother of the plaintiff managed the estate during the minority of the two sons. The suit is for partition for a half share in the family properties. The main contention of the 1st defendant is that the plaintiff is only entitled to a fifth share. The Subordinate Judge relying on an observation in *Raja* v. *Subbaraya*[1], held that the two sons were entitled to equal shares.

The question has been argued at great length before us. I am unable to agree with the Court below. The parties in this case are Sudras. In *Raja* v. *Subbaraya*[1] the dispute was between the natural son of a brother and the adopted son of another. It is settled law in Madras, notwithstanding *Raghubanand Doss* v. *Sadhu Churn Doss*[3] and *Giriapa* v. *Ningapa*[4] to the contrary that by right of representation the adopted son would take the share of his father in competition with the natural son of another member of the joint family. That was the only question that arose for decision in the Madras case. At the end of the judgment, the learned judges say "if there be such a special rule, as is suggested, it is not applicable at all events to Sudras, among whom the adopted son is declared entitled to take an equal share with a legitimate son who is born subsequently to the adoption". Apart from the text of Vriddha Gautama commented on in the Dattaka-Chandrika to which I shall presently refer, I have not been able to find any authority for this statement. On the other hand, *Ayyavu Muppanar* v. *Nelayadatchi Ammal*[5] gave the adopted son

1. (1883) I. L. R. 7 M. 263.
2. (1913) 25 M.L.J. 644; 15 M.L.T. 307.
3. (1878) I. L. R. 4 C. 425.
4. (1892) I. L. R. 17 B. 100
5. (1862) 1 M. H. C. R. 45.

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only a fifth share in the family properties. Apparently this decision was not brought to the notice of the learned Judges. In Bombay and Calcutta subject to the special doctrine which denies the right of representation to the adopted son in a joint family, it has been held that the share of the adopted son among Sudras is only a fourth of that of the natural son. See *Raghubanand Doss* v. *Sadhu Charan Doss* [1], *Giriapa* v. *Ningapa* [2] and *Bachoo* v. *Nagindas* [3].

On the authority of the Rishis and of the Smriti writers I feel no hesitation in holding that the adopted son is not entitled to share equally with the natural son. (1) The well-known text of Vasishta is in Chap. XV Sloka 9 "where a son has been adopted, if a legitimate son be (afterwards) born, the adopted son shares a fourth part." (2) Katyayana is quoted in the Dayabhaga and in Colebrooke's Digest Vol. III p. 348 as saying "A son of the body being born, the adopted sons of the same class take one-third as their portion. But in the Madanaparijatha and Viramitrodaya the sage is quoted as allotting only a fourth part. (3) Baudhayana takes the same view as Vasishta: See Dattaka Mimamsa S. V Sloka 42. (4) Manu in Chapter IX Sloka 163 says. "The aurasa son alone is the sole heir of the father's wealth; but as a matter of compassion he only gives maintenance to the rest." The Mitakshara interprets this passage as applying to the other class of sons "who are devoid of good qualities" and says that the general rule as to a fourth share is not affected by Manu's text.

As against these Smriti writers, we have the authority of Vriddha Gautama, who gives an equal share to the adopted son with the natural born son. It is not necessary to consider whether this text of the sage is an interpolation as surmised by Messrs. Golap Chander Sircar and Ghose. Mr. Shyama Charan Sircar in his Vyavastha Chandrika inclined to the view that the text is obsolete. The preponderance of authority, therefore, is in favour of the view restricting the rights of the adopted son to a fourth share.

Coming next to the commentators the majority of them enunciate the same rule. It is curious that Vignaneswara does not even mention Vriddha Gautama as an authority on this subject. This marked omission is significant. He refers to a number of Smritis and propounds the rule, that the adopted son's share is a

1. (1878) I. L. R. 4 C. 425. 2. (1892) I.L.R. 17 B. 100 (F.B.)
3. (1914) 16 Bom. L.R. 263.

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fourth of the aurasa son's (Mitakshara Ch. I sec. XI placitum 24 *et seq.*), Jimuta Vahana the author of Dayabhaga in discussing the share of the adopted son in Ch. X does not mention the authority of Vriddha Gautama. The Madana Parijata and the Viramitrodaya adopt the rule given in the Mitakshara. Saraswati Vilasa after a full discussion concurs in the same view. The author does not refer to Vriddha Gautama. The first note of dissent is to be found in the Dattaka Chandrika S. V. Paragraphs 24 to 32. The author reconciled the text of Vriddha Gautama with the others by restricting its application to Sudras alone. The text itself is general. But the commentator refers to the fact that among Sudras, illegitimate sons are given at least a third share in competition with legitimate sons and argues that adopted sons should not be in a worse position. It is permissible to point out that whatever may be the social status of an illegitimate son, the fact that he is of the same flesh and blood as the person whose property he seeks a share in, may account to the favourable position assigned to him. The same considerations do not always apply to an adopted son. The other reason given by the author with reference to Manu's text about a man having a hundred sons does not commend itself to me. It is curious that the Dattaka Chandrika in interpreting Vriddha Gautama's text, does not properly explain the words "Yatha Jathe". The author of the Dattaka Mimamsa translated the words as 'possessing good qualities.' Shyama Charan Sircar in his Vyavastha Chandrika gives the same meaning. In Ghose's Hindu Law, the quotation of Vriddha Gautama uses the words "Thatha Jathe." Whatever may have been the exact words, their literal meaning is "existing as above." The reference apparently is to the quality which a person to be adopted is expected to possess. Manu in Chapter IX Sloka 169 describes an adopted son thus:—"He is considered as a son made or adopted, whom a man takes as his own son, the boy being equal in class, endowed with filial virtues acquainted with the merit of performing obsequies to his adopter, and with the sin of omitting them." That is the reason why such an erudite scholar as Nanda Pandita translates Vriddha Gautama's text in the way I have mentioned. I am of opinion that Gautama's rule is an exception to the general law. It would be impossible to administer such a rule by courts, as the determination whether a man possesses good qualities would lead to endless conflict of views. The

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author of Dattaka Mimamsa after examining Vriddha Gautama's text carefully, inclines to the view taken by Vignaneswara and the other commentators. Thus, we see that with the exception of the Dattaka Chandrika, all the commentators agree in not giving an equal share to the adopted son. Mr. Narayanamurthi contended that as the Dattaka Chandrika is a special treatise on adoption, its conclusions are entitled to greater weight than those of the other commentators, he quoted *Collector of Madura* v *Moothu Ramalinga Sathupatty* [1] for this position. In the first place, the question that has to be decided does not relate to the qualification of the adopted son or to the ceremonies relating to the adoption. It is a question of inheritance. It is well settled that in matters relating to inheritance, the Mitakshara is paramount in Madras. Moreover as pointed by Mr. Ramadoss, the authority of Dattaka Chandrika is not to outweigh the sayings of the Rishis. See *Sri Balusu Gurulingaswami* v. *Sri Balusu Ramalakshmamma* [2] and *Puttulal* v. *Parbati Kunwar* [3]. Further the Dattaka Mimamsa another special authority on adoption takes a different view. I am therefore clearly of opinion that the view taken by the Dattaka Chandrika is not binding on us and that the dictum in *Raja* v. *Subbaraya* [4] based on this authority should not be followed.

Writers on Hindu Law almost unanimously accepted the view taken by the Mitakshara. Messrs. Golap Chandra Sirkar, Ghose, and Siromani Battacharya are unhesitatingly for a fifth share". Messrs. West and Buhler are of the same opinion. Mr. Mayne expresses no definite opinion on the question. He says that in Ceylon, the adopted son shares equally with the aurasa son. On the other hand the precedents quoted by Macnaughten in p. 184 show that the practice is different in India. On all these grounds, I hold that the plaintiff is only entitled to a fifth share in the family properties.

Another point in the appeal relates to the direction in the decree that the 1st defendant's share should be held liable for monies not accounted for by the 2nd defendant. This is clearly wrong. The 1st defendant may never benefit by the misconduct of his mother. See *Sonee Vishram* v. *Dhondu* [5].

The last point relates to the provision for marriage expenses. In *Srinivasa Aiyengar* v. *Thiruvangadathaiyengar* [6], Spencer, J.

1. (1868) 12 M. I. A. 397 at 436.
2. (1899) 26 I. A. 131 at 132.
3. (1914) 42 I.A. 155 at 161; 29 M.L.J. 68.
4. (1883) I. L. R. 7 M. 253.
5. (1904) I. L. R. 28 B. 330.
6. (1913) 25 M.L.J. 644; 15 M.L.T. 307.

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agreeing with Sundara Aiyar, J. held that in partition decrees provision should be made for the marriage expenses of the unmarried members of the family. On the other hand Sankaran Nair and Oldfield, JJ. in Appeal No. 89 of 1913 have taken a different view. The practice in Madras seems to be in consonance with the view taken in *Srinivasa Aiyengar* v. *Thiruvengadathaiyengar*[1], See Strange's Manual of Hindu Law pp. 190 and 191. Sir Thomas Strange in Chapter VIII refers to the opinion of pundits to that effect. *Jairam* v. *Nathu*[2] supports the appellant. Such a provision should be made only for persons who are of the same decree of relationship as those who have been married at the expense of the family.

In reversal of the decree of the Subordinate Judge, we direct that the plaintiff be alloted a fifth share in the properties found to belong to the family, that in passing the final decree a provision be made for the marriage expenses of the first defendant, and that that portion of the decree declaring the 1st defendant's share liable for malversation made by the 2nd defendant be omitted. Appellant is entitled to his costs from the 1st Respondent in the appeal.

The Chief Justice.

The Chief Justice:—I agree.

In Appeal No. 107 of 1913.

We think the 2nd defendant is entitled to maintenance at the rate of Rs. 10 per mensem charged on the estate, and to be paid by the plaintiff and the 1st defendant in proportion to their shares in the joint family property and payable on the 10th of every month. There will be no decree for arrears. The decree is modified accordingly; otherwise the appeal is dismissed with costs.

In Appeal No. 158 of 1913.

The Subordinate Judge is wrong in disallowing item 18 in schedule A. The reason that this item was sold away to the 18th defendant by the plaintiff is not sufficient to deprive him of his right to claim it as family property. The party whom the 1st defendant alleges as the owner of it was not before the court. This item must be included in the properties decreed to the plaintiff.

As regards item 11 in Schedule A, item 6 in Schedule C. and the E Schedule properties, we think the Subordinate Judge

1. (1913) 15 M. L. T. 307. 2. (1907) I. L. R. 31 B. 54.

Karuturi Gopalan v. Karuturi Venkata-raghavalu.

is right. The appeal must be dismissed in regard to them. With regard to the debt covered by Exhibit B the matter stands thus. Exhibit B is a deed of simple mortgage taken by the plaintiff's father in respect of Items 12 and 13 in 1892: At that time he was managing the properties of the 8th defendant's father. In 1895, the latter obtained from the plaintiff's father some of the properties entrusted to his management and gave Exhibit IA as receipt therefor. It is admitted that Exhibit B is not among the documents mentioned in that receipt. The case for the 8th defendant is that Exhibit B was subsequently handed over by the plaintiff's father to him. No receipt is produced evidencing the delivery. It seems unlikely that a receipt would not have been obtained if the document was really handed over. In 1905, the 2nd defendant purporting to act on behalf of the plaintiff and the 1st defendant executed a deed of release by which she gave up the claims of the two minors in Exhibit B. We are not satisfied that this was a *bona fide* settlement of a disputed claim. The evidence of the 2nd defendant about the properties having been in the possession of the 8th defendant is palpably false, as the properties were subjected only to a simple mortgage. There is no specific evidence that the money due under the document came from the estate of the 8th defendant's father. All that is deposed to is that as the plaintiff's father had the estate in his possession, the money must have come from that estate. We do not think this evidence is sufficient to alter the *prima facie* character of the transaction. We are of opinion that the money advanced belonged to the father of the plaintiff and the 1st defendant. They are entitled to their respective shares in the debt; items 12 and 13 of Schedule A are subject to this mortgage debt.

We cannot uphold for the reasons given in Appeal 98 the decree by which the 1st defendant's share in the property has been held liable for the monies not accounted for by the 2nd defendant. We must ask the Subordinate Judge to appoint a Commissioner to take an account of (*a*) the monies which came into the hands of the 2nd defendant as guardian of the two minors since the death of her husband in 1902; and (*b*) of the expenditure legitimately incurred by her in the management of the estate.

In passing the final decree plaintiff and the 1st defendant should be given their respective shares in the balance that may

be found due from the 2nd defendant. Plaintiff will have proportionate costs of this appeal from the 8th defendant in this and in the Lower Court. The other parties will bear their own costs.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Sir John Wallis, Chief Justice, and Mr. Justice Srinivasa Aiyangar.

A. Bharadwaja Mudaliar ... *Appellant* (1st Defendant)*

v.

Kolandavelu Mudaliar *alias* Kolandavelu Naicker and others. *Respondents (Plaintiffs and 2nd Defendant).*

Bharadwaja Mudaliar *v.* Kolandavelu Mudaliar.

Will—Construction—Legacy—Bequest of six acres of good irrigated nanja land out of 19·40 acres in a village—Bequest, not void for uncertainty—Nature of the interest of legatee's heir—Construction so as to give effect to the legacy—English rules of construction.

Where a testator bequeathed certain lands by the undermentioned clause *viz.*, "I give to my father's sister's second son. Murugesa Mudaliar .... 6 acres of good irrigated nanja lands in the village of Pudur, etc ," and the testator had 19·40 acres of land answering to the description, and the legatee died without having selected 6 acres and his heir brought a suit against the executor for the 6 acres and mesne profits.

Held, the bequest is not void for uncertainty. The legatee has a vested interest in 6 out of the 19·40 acres as a tenant-in-common along with the residuary legatee and is entitled to a partition by metes and bounds by court.

Per Wallis, C.J.—The English rule as to selection by the legatee is too artificial rule to be applied to a Hindu agriculturist. His intention would generally be that the lands should to be partitioned by the court in the absence of any agreement.

Per Srinivasa Aiyangar, J.—Courts should if possible construe the will so as to give effect to the legacy and ought not to hold a will void for uncertainty unless it is utterly impossible to put a meaning on it.

Appeal against the decree of the District Court of North Arcot in O. S. No. 9 of 1913.

[The facts are fully set forth in Mr. Justice Srinivasa Aiyangar's Judgment.]

G. S. Ramachandra Aiyar for Appellant.

S. Srinivasa Aiyangar and *C. V. Ananthakrishna Aiyar* for Respondents.

The Court delivered the following

The Chief Justice.

Judgments:—*The Chief Justice*:—The legacy in this case is of six acres of good irrigated nanja lands in the village of Pudur. Assuming that the legacy is out of the nanja lands owned by the testator, the will does not say which of them the legatee is to have; and in England such a bequest would have been held void

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* A. S. No. 195 of 1914. 6th October 1915.

Bharadwaja Mudaliar v. Kolandavelu Mudaliar.

The Chief Justice.

for uncertainty but for the benevolent rule of construction that the testator is intended to have left the choice to the legatee. *Tapley* v. *Eagleton* [1], Bacon's Abridged Title Election A ; and the other authorities referred to in *Narayanaswami Gramani* v. *Periathambi Gramani* [2], where the rule was applied and recognised. The reasons for reading into the will something that is not there, *viz.*, that the legatee should himself make the selection, was that without such a provision the legacy was regarded as bad for uncertainty. In the present case unfortunately the legatee died without making the election, and the accepted view in England would appear to be that the will cannot be read as intending that the heirs of the legatee should be allowed to make the election in the event of the legatee dying without having made it. See the old authorities cited in Bacon's Abridged Title Election C. That would be equivalent to reading it as a bequest of six acres to be elected by the donee and his heirs. In *Earl of Bandon* v. *Moreland* [3], where under a settlement a power of election was given to the beneficiary, his heirs or assignees, it was held that this disposition offended against the rule against perpetuities, but that the powers of the beneficiary and of his heirs or assignees, were severable, and that an election made by the beneficiary himself in his lifetime would be supported. The same rules were recognised and applied in *Savill Brothers Ltd.* v. *Bethell* [4]. These are, however, somewhat artificial rules to apply to the will of a Hindu agriculturist who was no doubt familiar with the ordinary process of partitioning lands by the Court in a partition suit and I think it much more likely that his intention was that in the absence of agreement the lands in question should be partitioned by the court than that the legatee should be left to make a selection for himself. In this view I see no sufficient reason why the Court should not give effect to the testator's intention by partitioning off and allotting to him land of the nature and extent indicated in the will out of the land left by the testator and I concur in the order proposed by my learned brother whose Judgment I have had the advantage of reading.

Srinivasa Aiyangar, J.

Srinivasa Aiyangar, J.:—This appeal raises a question of some difficulty on the construction of a clause in the will of one Dhanakoti Mudaliar. The clause in question reads thus: "I give to my father's sister's second son Murugesa Mudaliar my big house

1. (1879) 12 Ch D. 683.
2. (1895) I.L.R. 18 M. 460.
3. (1910) Ir. Ch. 220.
4. (1902) II Ch. 523.

at Tiruvannamalai and also 6 acres of good irrigated nanja lands in the village of Pudur in Arcot Taluk and also give him Rs. 3,000 without any restriction from me." No question arises now as to the bequest of the house or of the legacy of Rs. 3,000. Murugesa Mudaliar, the legatee is dead and his sons are the plaintiffs in this suit. It appears from the evidence that the testator had, besides other lands, 19·40 acres of land in the village of Pudur which answer the description of good irrigated nanja lands, though all of them are not of quite the same quality. They are the lands described in Schedule B to the plaint. The plaintiffs claim 6 out of the 19·40 acres and state that the 1st defendant, who is the residuary legatee and also executor by implication, has failed to put them in possession of the 6 acres and they ask for a decree directing the 1st defendant to deliver possession of 6 acres of good irrigated nanja lands out of the B Schedule lands in Pudur. In the schedule there is a note stating that items 1 to 15 measuring 9 acres 2 cents are good irrigated lands and that plaintiffs want 6 out of the 9 acres 2 cents. The 1st defendant pleaded that he never objected to the plaintiffs taking their portion of the nanja lands in Pudur bequeathed to their father and that he was not therefore liable for mesne profits; and also proceeded to state that the provision in the will was vague, indefinite and uncertain, and that the plaintiffs had to make their selection from the whole of the lands in Pudur village possessed by the testator, and not solely from the 19·40 acres (Para 10 of the written statement). At the 1st hearing the 1st defendant definitely gave up the contention that the devise of the 6 acres was void for uncertainty. (Judge's Notes printed at page 12 of the printed book). The only question then that required determination was whether the plaintiffs were entitled to 6 out of 19·40 acres or 6 out of the whole of the extent, the particular 6 acres being determined by division and not by selection. The District Judge in the court below has, however, held that the plaintiffs were entitled to select 6 acres of land out of the lands belonging to the testator in the village of Pudur. The 1st defendant appeals against the decree and contends that the legacy of 6 acres was void for uncertainty, and the 1st question is whether there is any uncertainty as to the subject matter of the legacy.

The will is in English; but it is clear that the testator was not able to express himself accurately or clearly in that language. The lands which are given are ordinarilycultivable lands. Their

Bharadwaja Mudaliar v. Kolandavelu Mudaliar.

Srinivasa Aiyangar, J.

extent is certain and their locality immaterial as their value does not depend upon their situation as in the case of house sites. There is nothing in the will to indicate that the testator intended the legatee to select any particular 6 acres he desired. It seems to me that the testator had no idea of any selection by the legatee. In cases where out of a number of distinct articles or properties some are bequeathed, it is obvious that the testator must have intended that the particular properties to be selected by some one whether it is the legatee or the executor. As for example one out of the several houses or so many out of the horses in the testator's stable. If again, the devise is of a certain quantity of land at or near a particular place as for example, 20 acres of land near a house or surrounding a house, then presumably the testator leaves it to the legatee to select the particular 20 acres. So also when a testator is possessed of lands of different descriptions as pasture lands, building sites, garden lands, forest lands and cultivable lands and if he gives only a particular extent a right of selection may be implied. In the case for instance of cash or commodities there could be no doubt that a legacy of a particular quantity means a fraction of the whole. In the case of lands which may not be all of the same quality, the testator's intention may be to give to the legatee a right to select a particular quantity from out of a particular locality; that is a matter of construction. In this case the lands given are ordinary cultivable lands and, there is no reason to suppose that the testator made any difference or had any idea of difference with reference to any particular place or locality. I think the reasonable interpretation of the words used by him is that he intended to give to the legatee that fraction out of the total quantity of land which would give him the extent specified in the will. It is also clear that the testator intended the legatee to have the six acres of land immediately on his death. If the testator intended that the property should vest only on a selection made by the legatee, the language used by him would have been different. We should, I think, construe the will so as if possible to give effect to the legacy. "The modern doctrine" as stated by Jessel, M. R. "is not to hold a will void for uncertainty unless it is utterly impossible to put a meaning upon it," *In Re Roberts : Repington* v. *Roberts Gawen* [1]. I am therefore of opinion that the legatee had a vested interest in six out of the 19·40 acres as a tenant-in-

1. (1881) L. R. 19 Ch. D. 529.

common along with the residuary legatee, and is entitled to division by metes and bounds, of the 19·40 acres, and have an allotment made to him of 6 acres. He is, I think, also entitled to mesne profits of the lands for 3 years prior to the suit as claimed in the plaint. Subject to this modification the appeal is dismissed with costs.

The memorandum of objections is allowed. There will be no order as to costs.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Sadasiva Iyer and Mr. Justice Napier.

Kathari Narasimha Ragu ... *Appellant** (*Plaintiff*)

v.

Bhupati Ragu Raghunatha Ragu and others. *Respondents* (*Defendants*).

Transfer of Property Act S. 54—Property below 100 Rupees in value—Unregistered sale-deed—Title passes—With delivery of possession—Admissibility of, to prove agreement to sell.

The existence of an unregistered sale-deed does not prevent title passing where property sold is less than 100 Rupees in value and there has been delivery of possession. The unregistered sale-deed may be used for proving the prior agreement to sell.

Appeal under S. 15 of the Letters Patent preferred against the Judgment of the Hon'ble Mr. Justice Oldfield in S. A. No. 1652 of 1913, preferred against the decree and judgment of the Court of the Subordinate Judge of Masulipatam in A. S. No. 91 of 1912 against the decree of the Court of the District Munsif of Tanuku in O. S. No. 131 of 1909.

P. Chenchiah for *T. Prakasam* for Appellants.

B Somayya for *P. Narayana Murthi* for Respondents.

The Court delivered the following

Judgments:—*Sadasiva Aiyar, J.*—The plaintiff is the appellant. He owned the plaint land in 1900 or 1901. He brought the suit in 1909 having been out of possession for 8 or 9 years before the suit. His story was that the 3rd defendant became his lessee in 1900. That story has been found to be false. The Lower Courts have further found that in 1901 the plaintiff sold the plaint lands to the 3rd defendant, executed an unregistered sale-deed for Rs. 50 to the 3rd defendant, and put the 3rd defendant in possession of the land. On these findings they dismissed the

* L. P. A. No. 258 of 1914. 6th September 1915.

Kathari Narasimha Ragu v. Bhupati Ragu.

Sadasiva Aiyar, J.

plaintiff's suit. That unregistered sale-deed is not produced, the 3rd defendant suppressing it according to the defendants 1 and 2 who are the vendees from the 3rd defendant.

The contention in second appeal is that the plaintiff, though he failed to prove the lease to the 3rd defendant, is entitled to succeed on his title which existed in 1901, and had not been lost either by adverse possession when the suit was brought in 1907, or by his execution of the unregistered sale-deed of 1901 which is invalid and useless for the purpose of effecting a transfer of ownership by reason of the provisions of S. 54 of the Transfer of Property Act.

If there was no valid sale to the 3rd defendant in 1901, the plaintiff is entitled to succeed in his title as the suit is not barred by limitation. The plaintiff (appellant, relies on the decision in *Muthukaruppan Samban* v. *Muthu Samban* [1] for his contention that no title passed under the unregistered sale-deed for Rs. 50 (relied upon by the defendants 1 and 2) though it was accompanied by delivery of possession. It has been held in at least two cases in this court reported in (*Veda Muppan* v. *Kathan Padayachi* [2] and *Ammani* v. *Jagannadha Reddi* [3] that notwithstanding the existence of an unregistered sale-deed which cannot validly effect a transfer of ownership even in respect of a sale of property of the value of less than Rs. 100, the delivery of the property sold in pursuance of the contract of sale is sufficient under S. 54 (paragraph 3) of the Transfer of Property Act for the transfer of the title. Under paragraph 5 and 6 of S. 54 of the Transfer of Property Act, a contract for the sale of immovable property does not create any interest in or charge on such property and hence such a contract though in writing need not be registered even if it is for a price of Rs. 100, or more. Paragraph 3 of the section which refers to the transfer of title by delivery does not say that the contract of sale which is to be converted into a sale (or transfer of title to the property) should be an oral contract and cannot be evidenced by a written deed or that an invalid writing purporting to transfer title prevents the delivery itself of its effect of transferring the title. According to the definition of sale in the 1st paragraph of S. 54, two things (it seems to me) are required to constitute a sale : (1) a contract to transfer the ownership of the sold land in exchange

1. (1914) 27 M. L. J. 497.
2. (1909) 7 M. L. T. 372.
3. (1913) 18 M. L. T. 103.

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Sadasiva Aiyar, J.

for a price paid, etc., and (2) the transfer of such ownership accordingly by the vendor. In the case of property of the value of less than Rs. 100, the contract of sale followed by the delivery of property in pursuance of that contract completes the sale according to paragraph 3 and a registered conveyance is not indispensable. In *Nayappa* v. *Devu* [1] it has been held that an unregistered sale deed even for a sum of Rs. 100 can be used in evidence for proving the contract to sell though not to prove the transfer of ownership. *A fortiori* a sale deed for less than Rs. 100 can be used as evidence of the contract to make that sale. If there are any observations in *Muthukaruppan Samban* v. *Muthu Samban* [2] which tend to support the view that an unregistered document of sale cannot be used as evidence to prove even the contract of sale I am not, with the greatest respect, prepared to agree with those observations. There is nothing in paragraph 3 of S. 54 which constrains us to hold that if there is a contract of sale which is evidenced by a deed which is invalid to transfer title, the transfer of title by delivery cannot take place.

The case in *Muthukaruppan Samban* v. *Muthu Samban* [2], seems to have been decided on a very strict construction of the pleadings in that case against the defendants (see the sentence in the judgment at page 346 " Under these circumstances we do not think *that it is open to the appellants to set up an oral sale* as to which there was no issue or any evidence.)

I would therefore dismiss the Letters Patent Appeal with costs.

Napier, J.

Napier, J. :—I assume that in this case there was no oral evidence to prove the oral sale other than the unregistered document. The questions are whether the fact that there is a document to prevent the 3rd defendant relying on an oral sale followed by possession and whether, if not, he can use the unregistered document to prove that the transfer was on exchange for a price paid or promised within the meaning of S. 54 of the Transfer of Property Act. On the first point I can see no reason why the existence of the document should prevent the proof *aliundi*. S. 54 says that transfer may be made either by a registered instrument or by delivery. Until the document is registered, it has no effect to " transfer " and it must be open to the parties at any stage before registration to adopt the simple process of delivery. On the second question reliance is placed on the language used by

1. (1890) I. L. R. 14 M. 55.   2. (1914) 27 M. L. J. 497.

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Napier, J.

the Judges who decided the case *Muthukaruppan Samban* v. *Muthu Samban* [1], which certainly lends support to that view. I am however unable to agree with it. The document is not compulsorily registrable under S. 17 of the Registration Act and therefore we have not to consider whether the proposed use to prove the agreement would not be permissible because it would affect immovable property within the meaning of S. 49 of the Registration Act. I am unable to accept the construction put on S. 54 in the above case that it requires all sale deeds if in writing to be registered. In my opinion it only requires that if the sale deed is to be relied on to establish transfer it must be registered. There being no law requiring the document to be registered, I see no reason why it should not be proved and used as required by the Evidence Act S. 91. That it could be so used is assumed in *Krishnamma* v. *Suranna* [2], a case decided by a Full Bench of this Court (vide also *Bhimaraz* v. *Latchamma* [3], and *Kota Muthanna Chetti* v. *Alibeg Sahib* [4]), and the same view has been taken by this court quite lately in a case reported in *Ammani* v. *Jagannadha Reddi* [5]. I am therefore of opinion that the unregistered document is admissible in evidence to prove the contract, and there being evidence of delivery, the sale is proved. I agree therefore with the learned judge and would dismiss this appeal with costs.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Sadasiva Aiyar and Mr. Justice Napier.

Navanna Vena Ramachetty ... *Appellant** (*1st Defendant*)

v.

A. L. A. R. R. M. Arunachalam Chettiar and another. *Respondents* (*Plaintiffs*).

Ramachetty v. Arunachalam Chetty.

Madras Estates Land Act, S. 151 (1)—Materially impairing in value and rendering unfit for agricultural purposes—The holding as a whole to be so affected to give a right of action.

The question under S. 151 of the Estates Land Act is whether the holding *as a whole* has been materially impaired in value for agricultural purposes and rendered substantially unfit for such purposes The fact that a portion alone has been so impaired in value and rendered unfit for cultivation without substantially impairing in value and rendering unfit for agricultural purposes the whole, is insufficient to give the landlord a right of action under the section.

Hari Mohun Misser v. *Narayana Singh* [6] applied.

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* S. A. N. 1566 of 1913. 18th August 1915.

1. (1914) 27 M.L.J. 497.
2. (1892) I.L.R. 16 M. 148 s.c. 3 M.L.J. 54.
3. (1881) I.L.R. 3 M. 46.
4. (1882) I. L. R. 6 M. 174.
5. (1913) 18 M.L.T. 103.
6. (1907) I.L.R. 34 C. 718; s.c. 17 M. L. J. 361.

Appeal against the decree of the District Court of Ramnad in Appeal Suit No. 106 of 1913 preferred against the decree of the Court of the Deputy Collector of Devakota in Summary Suit No. 556 of 1912.

Ramachetty *v.* Arunachalam Chetty.

T. Rangachariar and *R. Kuppuswami Aiyar* for Appellants.

S. Srinivasa Aiyangar for Respondents.

The Court delivered the following

Judgment:—The 1st defendant is the Appellant. The plaintiffs who are the landlords of the plaint land brought this suit for the following reliefs:—

(*a*) that the permanent damage to the plaint land area of ¼ Kurukkam inflicted by the defendants by their having erected two walls on the site and placed two stone pillars thereon be removed at the defendants' expense,

(*b*) that the defendants may be made to pay the plaintiffs their costs.

The plaint ¼ Kurukkam area is in one corner of a big tope land measuring a little over 12 Kurukkams in extent in the village of Kalakkudi. The plaintiffs' complaint is that as the 12 and odd Kurukkams were granted as tope lands on tope cowle (that is for cultivation of fruit trees) the defendants had no right to convert any portion of the lands into a building site and the defendants by enclosing ¼ Kurukkam by walls, by raising its level and by fixing stone pillars, have made that portion unfit for Horticulture. The suit was brought in the Revenue Court under S. 151 (2) of the Madras Estates Land Act.

The second issue raised in the case was whether the suit land or any portion of it has been materially impaired in its value for agricultural purposes and if so, when? The suits Deputy Collector gave his finding as follows:—"It is clear from the evidence that the ¼ Kurukkam in question has been rendered unfit for cultivation. I therefore find this issue in favour of plaintiffs". Now the issue was whether the suit land or *any portion of it* has been materially impaired in its value for agricultural purposes and the finding is that ¼ Kurukkam in question has been rendered unfit for cultivation. There is no finding that the suit land of 12 and odd Kurukkams taken *as a whole* has been materially rendered unfit for cultivation as a tope.

The Lower Appellate Court in a very short judgment says. "It may be that the plot in question is only a small fraction

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of the holding but that circumstance would not take the case out of the purview of Section 151 of the Madras Estates Land Act;" and on this finding, the suits Deputy Collector's decree directing the defendants to remove the walls and to restore the land to its original state was confirmed.

Of the contentions in Second Appeal before us, only one need be considered, the others not being seriously pressed. That one contention is that the Courts below have not considered and tackled the question whether there was material impairing of the holding of 12 and odd Kurukkams taken as a whole by acts done on the plaint ¼ Kurukkam area and that is what they had to consider under Section 151 Clause 2 of the Madras Estates Land Act.

Section 151 Clause 1 of the Act is as follows:—

"A land-holder may institute a suit before the Collector to eject an occupancy ryot from his holding only on the ground that the ryot has materially impaired the value of the holding for agricultural purposes and rendered it substantially unfit for such purposes." Clause 2 allows the land-holder to sue not only for the relief of ejectment mentioned in Clause 1 but also for injunction, or for the repair of the damage or for compensation or for a combination of these three reliefs. I am unable to accept the ingenious argument of the respondents' learned Vakil Mr. S. Srinivasa Aiyangar that the right given by the 2nd Clause to the land-holder allowing him to sue for an injunction is not governed by the condition laid down in the first clause, namely that the ryot must have materially impaired the value of the holding for agricultural purposes and rendered it substantially unfit for agricultural purposes. The second clause is clearly a supplement to the first clause giving the supplementary and alternative reliefs to the relief of ejectment given by the first clause, the right to sue for these supplementary and alternative reliefs however being governed by the same conditions.

The provisions of S. 151 were compared by learned vakils on both sides during the arguments with provisions of S. 11. S. 11 says "a ryot may use the land in his holding in any manner which does not materially impair the value of the land or render it unfit for agricultural purposes". It will be seen that there is a slight difference between the wording of S. 11 and the wording of clause 1 of S. 151 in two points. The

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word "substantially" is omitted in S. 11 before the words "unfit for agricultural purposes." Again the word "and" is substituted in S 121 for the word "or" before the word "render". Lastly the words "for agricultural purposes" appear only at the end of S. 11 whereas they appear after both the verbal clauses in S. 151 clause 1. I am unable to see what the difference between "materially impairing the value of the holding for agricultural purposes" and "rendering it substantially unfit for agricultural purposes" is or why the conjunction "and" was substituted for "or" in the latter section. I do not think that any real distinction was intended to be made by the slight differences in phraseology between S. 11 and S. 151 Clause 1.

The substantial question for decision is therefore whether Section 151 intended to give the land-holder a right to sue for any of the reliefs mentioned therein in all cases even if only a part of the holding was rendered unfit for agricultural purposes or whether it intended to give the right to sue for any of those reliefs, only when the holding *as a whole* was rendered substantially unfit for agricultural purposes by the acts of the ryot committed on the whole or on any part of the holding. On this question I think we are bound by the decision of the Privy Council in *Hari Mohun Misser* v. *Narayan Singh* [1]. In that case, the Calcutta High Court in construing S. 23 of the Bengal Tenancy Act (on which S. 11 of the Madras Estates Land Act is founded) laid down that the land-holder is entitled to an injunction to remove an indigo vat built upon a portion of a large holding "because that portion had become evidently unfit for agricultural purposes." Their Lordships of the Privy Council say that the proposition of law so laid down by the High Court, (namely, that even if a part of a holding had become unfit for agricultural purposes, the landlord is always entitled to an injunction to rectify the acts done on that part of the holding) cannot be upheld as that proposition was laid down too broadly and unconditionally. Their Lordships say that "reference must be had to the circumstances of individual cases," "to the size of the holding," "to the area withdrawn from actual cultivation," and "to the effect of such withdrawal upon the fitness of the holding taken as a whole for profitable cultivation" before the relief of injunction could be granted.

1. (1907) 17 M. L. J. 331, I. L. R. 34 C. 718.

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We are bound to follow this ruling of their Lordships and as we find that the Lower Courts have in arriving at their conclusions merely considered that question whether the ¼th Kurukkam in dispute was rendered unfit for agricultural purposes and have not considered the question whether with reference to the circumstances of this individual case with regard to the size of the holding, with regard to the area withdrawn from actual cultivation and with regard to the effect of such withdrawal upon the fitness of the holding, the value of the holding as a whole has been materially impaired for the purpose of the horticulture, we cannot confirm their decrees.

I would therefore call for a finding from the Lower Appellate Court on the following issue on the evidence already on record. "Has the holding of 12 and odd acres taken as a whole been materially impaired in value for agricultural purposes" (which include horticultural purposes) "or rendered substantially unfit for the said purposes owing to the acts found to have been committed by the defendants on the ¼th Kurukkam referred to in the plaint having reference to the circumstances of this case, having regard to the size of the holding as a whole and to the size of the area withdrawn from actual cultivation and to the effect of such withdrawal upon the fitness of the holding taken as a whole for profitable cultivation." The finding should be submitted within 6 weeks from the receipt of records and 10 days will be allowed for filing objections.

[In compliance with the order contained in the above judgment of this Court the District Judge of Ramnad submitted his finding on the issue in the negative and against plaintiffs]

Judgment:—We accept the finding and setting aside the decrees of the Lower Courts we dismiss the plaintiffs' suit with costs in all Courts payable by the plaintiffs to the 1st defendant.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Seshagiri Aiyar and Mr. Justice Napier.

M. Narayan Singh ... ... *Appellant* *

v.

Aiyasami Reddi and others ... ... *Respondents.*

Narayan Singh v. Aiyasami Reddi.

Suits Valuation Act S. 4—Suit by unsuccessful claimant—Jurisdiction—Value of property, the test.

Where an unsuccessful claimant brings a suit for a declaration that the property belongs to himself and not to the judgment-debtor making the judgment-

* L. P. A. No. 363 of 1914. 2nd August 1915.

debtor a party to the suit the *forum* is determined by the value of the property and not merely by the amount of the decree debt for which the property is attached.

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Krishnasami v *Somasundaraji* 1 doubted.

Appeal under Clause 15 of the Letters Patent against the order of this Court in C. R. P. No. 907 of 1913, preferred against the order of the District Court of Chingleput in O. S. No. 31 of 1913.

S. Krishnamurthi Aiyar for Appellant.

A. Krishnaswami Aiyar for Respondent.

The Court delivered the following

Judgment:—We think the learned Judge is right. The 1st defendant obtained a decree against the 2nd defendant and attached the suit property as his. The plaintiff put in a claim petition. He made the judgment-debtor and the decree holder (2nd and 1st defendant) parties to that petition. His claim was disallowed and he has brought this present suit under O. XXI R. 63. The value of the property in suit is Rs. 4,000, whereas the decree of the 1st defendant is for Rs. 300. The question for determination is what is the value of the suit for purposes of jurisdiction. The Court fee under Schedule II Article 17 of the Court Fees Act will be the same whatever be the value of the property. The District Judge held that the suit ought to be instituted in his Court as the value of the land in dispute exceeded the pecuniary limits of the District Munsif's jurisdiction. The defendant asks this Court to revise that order on the ground that the value of the suit is the value of the decree obtained by the 1st defendant against the 2nd defendant.

Under S. 4 of the Suits Valuation Act, the plaintiff is not entitled to put a higher value on the suit than what is covered by his interest in the litigation. The decision of the judicial committee in *Phul Kumari* v. *Ghaushyam Misra* [2] is to the same effect. Their Lordships say that the value of the action is its value to the plaintiff. If that criterion is applied, the suit ought to be valued with reference to the relief sought by the plaintiff. In *Fisher* v. *Arunachella Chettiar* [3] this Court came to the conclusion that for purposes of jurisdiction the right put forward by the plaintiff fixes the value of the suit.

On the other hand, the decision of the Full Bench in *Krishnasami Naidu* v. *Somasundaram Chettiar* [1] lays down that in

1. (1907) I. L. R. 30 M. 335; s.c. 17 M. L. J. 95.
2. (1907) I. L R. 35 C 202.
3. (1907) 19 M. L. J. 236.

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determining jurisdiction the lowest value whether it be that of the decree under execution or of the property under attachment should be accepted as determining the form for the trial of the suit. We find no reference in this judgment to the decision of the judicial committee in *Phul Kumari* v. *Ghaushyam Misra* [1]. Moreover in the present case both to the claim proceedings and to the suit, the judgment-debtor was a party. The prayer in the suit is not only to cancel the attachment but also for a declaration that the judgment-debtor has no interest in the property. The proper issue must relate to the conflicting title of the plaintiff and of the 2nd defendant and the decision on it will be binding on both. Consequently the value to the plaintiff of this suit is his full interest in the land whose attachment he seeks to raise. The learned judges who decided *Krishnasami Naidu* v. *Somasundra Chettiar* [2], base their decision on the ground that the judgment-debtor will not be affected by the decision in the suit. The present case is distinguishable from the Full Bench ruling because the plaintiff here has distinctly asked for an adjudication against the 2nd defendant. It is doubtful whether the Full Bench Decision is good law having regard to the decision in *Phul Kumari* v. *Ghaushyam Misra* [1]. However that may be, we feel no difficulty in holding in this case that the learned judge is right in his view that the value of the suit is the value of the entire property claimed by the plaintiff.

We dismiss the Letters Patent Appeal with costs.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Sadasiva Aiyar and Mr. Justice Spencer.

Sri Sri Sri Vikromadeo Maharajilu Garu, Maharaja of Jeypore. *Petitioner* * *(Plaintiff)*

v.

Hari Krishna Patro *alias* Raghunatha Patro and others. *Respondents (1 to 3 Defendants).*

Maharaja of Jeypore v. Hari Krishna Patro.

Right of suit—Vizagapatam Agency Rules—Attachment—Claim petition allowed—Suit for declaration of judgment-debtor's title to property—Maintainability of.

Under the law prevailing in the Vizagapatam Agency, an action will not lie for a declaration that an attached property in respect of which a claim has been allowed belongs to the judgment-debtor.

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* C. M. P. No. 1830 of 1913. 30th April 1915.

1. (1907) I. L. R. 35 C. 202.
2. (1907) I. L. R. 30 M. p. 335; s.c. 17 M. L. J. 95.

Sri Maharaja of Jeypore v. Hari Krishna Patro.

Petition under Rule XX of the Ganjam and Vizagapatam Agency Rules praying that in the circumstances stated therein, the High Court will be pleased to direct the agent to the Governor, Vizagapatam to review his judgment in A. S. No. 6 of 1912 preferred against the decision of the Court of the Special Assistant Agent of Korapat dated 18th July 1912 in O. S. No. 20 of 1908.

B. N. Sarma for the Petitioner.

T. Rangachariar for 3rd Respondent.

The Court made the following

Order:—The question for decision is whether under the law prevailing in the Vizagapatam Agency a suit will lie for a declaration that a certain property in respect of which a claim petition has been allowed is the property of the judgment-debtor. The plaintiff is the Maharajah of Jeypore.

In execution of a decree for costs he got attached a tope to which the 3rd defendant advanced a claim that it was in his possession on behalf of a deity to whom it had been gifted before the attachment. The Special Assistant Agent upon evidence recorded by the Agency Munsif of Jeypore and upon a report ordered the attachment to be withdrawn and the execution petition to be struck off the file. Now the plaintiff has brought this suit to establish the title of defendants 1 and 2 to the said tope and to get the order on the claim petition vacated. Both the Special Assistant Agent and the Agent to the Governor have held that the suit is not maintainable.

Rule XXVI clause 2 of the Rules framed by the Government under Act XXIV of 1839 for the guidance of the Courts in these Scheduled Districts permits decrees for a sum of money to be executed by selling the lands and other effects belonging to the party against whom the judgment may have been given. Where a question is raised whether one of the items attached does in fact belong to the judgment-debtor, the parties have in justice and equity a right to get this question determined even though the rules may not expressly provide for claim petitions, and in the present case they did get the ownership of the tope decided by the Special Assistant Agent's order of June 19th, 1909. O. 21 R. 63 of the Civil Procedure Code which gives the right to a party against whom an order in a claim petition is made to institute a suit to establish the right which he asserts, is a provision of the nature of an appeal, as it provides for the decision of a Competent Court

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of Civil Jurisdiction being superseded by another decision. The provision has not been extended to the Agency Tracts of Vizagapatam, we think, purposely to prevent the unsophisticated inhabitants of those regions being harrassed by bewildering multiplicity of legal proceedings.

Rule XIII applies to Civil trials in Agency Courts only those rules of the Civil Procedure Code which relate to the examination of witnesses in appealable cases. There is no inherent right of appeal where the statute does not create one. Consequently the order of June 19th has become a final one. We notice that this order was based on evidence not recorded by the Judge who passed the order, and we have heard arguments as to whether that procedure was legal, without deciding whether Rule XIII, which requires that evidence in "all civil trials" shall be taken in the manner prescribed by the Code of Civil Procedure, has any application to claim petitions in this Agency. We are clearly of opinion that the Judge's procedure, assuming it to have been irregular, has no bearing on the question now at issue, for it has not been hitherto the case of the plaintiff that the order is void through not being based on legal evidence (in which case it would be again open to him to attach the released property) but rather that he has a right to have, it does not appear that the plaintiff took objection to the procedure of calling for a report from the Subordinate Court and acting on evidence recorded by it either when the order was passed or in the trial of the present suit or in his grounds of appeal.

The Agency Courts have further decided that no suit could be brought for a declaration under S. 42 of the Specific Relief Act, as that Act is not in force in the Scheduled Districts. The Hon'ble Mr. Sarma for the appellant quoting *Robert Fisher* v. *The Secretary of State for India in Council* [1], contends that independently of the Specific Relief Act there is a common law right vested in every subject to have his title which is in dispute declared. It is unnecessary to discuss this point, for the nature of the present suit is not that of a mere suit for a declaration as to a legal right or character, but is essentially one to set aside a judicial order upon a claim by a 3rd party to property which was the subject of execution, and such a suit will be maintainable only in localities where by an enactment such as the Civil Procedure Code a statutory right has been created.

1. (1898) I. L. R. 22 M. 270.

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The present suit has had a previous history.

It was in the 1st instance dismissed and the dismissal order was set aside by this Court in C. M. P. No. 2479 of 1907. It was therein held by another Bench of this Court that the ground upon which the Special Assistant Agent had dismissed the suit namely that S. 244 of the Civil Procedure Code of 1882 was a bar to the suit, was not a good one. The suit was in consequence restored to file and again dismissed.

The point which has now been taken was not argued at the hearing of that Civil Miscellaneous Petition nor should the learned Judges who decided it be understood as meaning to say that the suit as laid was maintainable from every possible point of view.

The Agent's judgment is right. We dismiss the petition with costs.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Mr. Justice Ayling and Mr. Justice Tyabji.

Alamanayakunigari Nabi Sab minor, by next friend and mother Fakir Bee ... *Appellant* (3rd Defendant)*

v.

Murukuti Papiah (since dead) and others. ... *Respondent. (Plaintiffs, 1st Defendant and Plaintiff's Legal Representatives).*

Alamanaya kunigari Nabi Sab v. Murukuti Papiah.

Transfer of Property Act, S. 43—Mortgage by son of property belonging to his father—Erroneous representation of present title to property—Mortgagor succeeding to the property as heir—Right of mortgagee—Mahomedan Law—Gift—Essentials of—Minor donee—Transfer of possession, if necessary.

Where a person mortgaged property belonging to his father erroneously representing that he was entitled to the property *in præsenti* and on his father's death he became entitled to the property as heir *held*, that S. 43 of the Transfer of Property Act applied to the case and that the mortgagee could enforce his mortgage against the property mortgaged.

Where a Mahomedan made a gift of a field to his minor grandson during the life-time of his son and at a time when all the three lived together in the same house the circumstance that possession of the field was not delivered to the minor's father is not fatal to the validity of the gift. In such a case the gift would be valid, if after it was made, the income or other benefit derived from the field was applied to the use of the minor so as to show that a transfer of ownership had been made.

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* S. A. No. 1045 of 1912. 29th March 1915.

Alamanaya-kunigari Nabi Sab v. Murukuti Papiah.

Fakir Nynar Muhammed Rowther v Kandaswami Kulatha Vandan (1) Ref.
The requisites of a valid gift under the Mahomedan Law, explained.

Second Appeal against the decree of the District Court of Cuddapah in Appeal Suit No. 28 of 1911, preferred against the decree of the Court of the District Munsif of Cuddapah in Original Suit No. 468 of 1909.

K. V. Krishnasawmy Aiyer for *S. Gopalasawmy Aiyangar* for Appellants.

A. Visvanatha Aiyar for *B. N. Sarma* for respondents.

The Court delivered the following

Ayling, J.

Judgments:—*Ayling, J.*—I have had the advantage of perusing the judgment of my learned brother. As regards the applicability of S. 43 of the Transfer of Property Act, in case the gift should be held invalid, I entirely agree with him.

The validity of the gift under Mahomedan Law is a more difficult question regarding which, even if I saw reason to disagree with him, I should do so with extreme diffidence. I see no reason to differ, and agree to the finding for which he proposes to call.

Tyabji, J.

Tyabji, J.—The plaintiff sues to enforce a mortgage, Exhibit A, executed by the 1st defendant on 2nd December 1907. The property mortgaged did not belong to the 1st defendant but solely to his father the 2nd defendant.

The 2nd defendant died before the suit came on for hearing.

On the death of the 2nd defendant all his estate devolved on the 1st defendant under Muhammadan Law, the defendants being Muhammadans.

The plaintiff contends that under S. 43 of the Transfer of Property Act the mortgage purported to be made by the 1st defendant will operate on the 1st defendant's interest in the property mortgaged. The reply is:—

(1) that the property did not belong to the 2nd defendant at his death, and that consequently it has not devolved on the 1st defendant;

(2) that even if it has devolved on the 1st defendant, S. 43 does not apply. These were not the contentions on which the suit was instituted, and do not appear on the pleadings.

1. (1909) I. L. R. 35 M. 120.

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Tyabji, J.

The facts leading up to these contentions are as follows :—

According to the case of all the parties the 2nd defendant was, prior to 2nd December 1907, the owner of the property in dispute. On that day the mortgage Exhibit A, was executed by the 1st defendant describing himself as "son..........of Fakruddin (the 2nd defendant) Muhammadan by caste, living by cultivation and resident of Vempalli village". The operative part is to the following effect :—

"On account of my necessities I have borrowed from you... ....in all Rs. 300. I shall pay on demand the said sum of Rs. 300 with interest thereon". Then the lands in question are described and the document proceeds :—"These lands bearing this assessment are mortgaged by me. I shall not alienate the said fields in favour of others by way of gift sale, etc., till the abovesaid amount and interest is paid. This is the deed of mortgage executed and given with my consent." The deed is signed by the 1st defendant and his signature is attested. No one else executes the document. It is duly registered.

When the plaintiff instituted the suit, the 2nd defendant was living and S. 43 of the Transfer of Property Act was not available to him even on his own allegations. The allegations contained in the plaint were that the 1st defendant was "the manager of the family," that the mortgage was executed by him for family purposes, and that he acted both for himself, and as agent for the other defendants, *i.e.*, for his father the 2nd defendant, and for his son and daughter the 3rd and 4th defendants.

The 1st defendant's written statement is as follows:—"The suit debt is true. It is what I contracted."

The 2nd defendant's written statement contains categorical denials of the 1st defendant being manager or agent. It also refers to a gift by the 2nd defendant to the 3rd defendant, under which the property is stated to have been delivered into the possession of the 3rd defendant. "Since then," the written statement continues "the 3rd defendant himself is enjoying the said property." It is on this gift that the contentions of the defendants above referred to depend. For, if the gift was valid and effective; the property became the 3rd defendant's prior to the death of the 2nd defendant, and did not devolve on the 1st defendant as the 2nd defendant's heir, nor was it affected by any of the acts of the 1st defendant under S. 43 of the Transfer of Property Act.

Before the suit came on for hearing the 2nd defendant died, and S. 43 of the Transfer of Property Act became available to plaintiff. His contention, that apart from that section the property was subject to the mortgage because the 1st defendant acted as manager and as agent of the 2nd defendant (though it was the primary case of the plaintiff and the subject of an issue) was not considered by the Courts below. Both Courts held the gift to be invalid, and that S. 43 of the Transfer of Property Act applied.

It was argued before us in the first place that even if the gift was invalid S. 43 of the Transfer of Property Act would not avail the plaintiff. The argument was that to hold so would be to hold that the 1st defendant could validly transfer his "chance of succeeding to an estate as an heir-apparent," and reliance was placed upon *Ramasami Naik* v. *Ramasami Chetti* [1] for the contention that S. 43 should not be so construed as to nullify S. 6 *(a)* of the Transfer of Property Act, by validating a transfer initially void under S. 6 *(a)*. This argument, however, neglects the distinction between purporting to transfer "the chance of an heir-apparent," and "erroneously representing that he (the transferor) is authorised to transfer certain immovable property." It is the latter course that was followed in the present case. It was represented to the transferee that the transferor was in *praesenti* entitled to and thus authorise to transfer the property. In Ramasami Naik's case what the transferors "purported to transfer, were mere possibilities of succession within the prohibition in S. 6 *(a)* of the Transfer of Property Act".

The other cases cited on this point for the appellant have also no application. In *Nurul Hossein* v. *Sheosahai Lal* [2], there was no erroneous representation: both parties knew what the facts were. In *Rashmoni Dasi* v. *Surja Kanta Roy Chowdry* [3] the parties had contracted to sell subject to the sanction of the Court, which could not be obtained. In *Pandri Bangaram* v. *Karumoory Subbaraju* [4], the objection taken and upheld was that though there was an erroneous representation, the transferee was not misled by it and that unless the transferee is so misled S. 43 does not apply.

None of these objections apply in the present case. On the contrary the illustration to S. 43 seems exactly in point, except

1. (1906) I. L. R., 30 M. 255, 262.
2. (1892) I. L R. 20 C. 1.
3. (1906) I. L. R. 32 C 832.
4. (1910) I. L. R. 34 M. 159.

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that the transfer is here by way of mortgage and in the illustration it is a sale. Here, as in the illustration the son represented that he was authorised to transfer property which in fact was not his property but his father's: and if therefore the son subsequently "as heir obtained the property" of his father, the transferee "may require the son to deliver it to him"— in this case to have it declared subject to the mortgage. Whether the son (the 1st defendant) "as heir obtained the property" depends upon whether prior to the 2nd defendant's death he had made a gift of the property to the 3rd defendant.

The validity of the gift under Exhibit I must therefore be next considered. The District Munsif held against the validity of the gift apparently on the grounds (1) that the execution of Exhibit I was not legally proved as, though "it was spoken to by its writer," no attestor was called to prove its execution. The only ground of appeal with reference to this manifest disregard by the District Munsif of the provisions of S. 72 of the Indian Evidence Act was that he "erred in thinking that the writer of a deed is not an attestor and proof thereof by him is no proof." No reference to this is to be found in the judgment of the District Judge or in the grounds of appeal to this Court; and it was not questioned before us that the execution of Exhibit I was satisfactorily proved.

The District Munsif further held (2) that assuming Exhibit I to be proved, it was not valid because there was neither acceptance nor delivery of possession of the gift; as to possession he refers to and apparently accepts the plaintiff's evidence that the 1st defendant has been and is in cultivation and possession of the properties, and that the 1st or 2nd defendant has been paying the assessment.

He also casually says: (3) "It is clear from the very wording of Exhibit I, that the gift was simply intended to defeat the plaintiff's claim."

In appeal to the District Judge it was argued that formal transfer of possession was unnecessary as the donor and donee were living together. The District Judge considered this contention to be supported by the authority of *Humera Bibi* v. *Najam-un-nissa Bibi* [1]. He was of opinion, however, that though transfer of possession may be unnecessary, acceptance of the gift was

1. (1905) I. L. R. 28 A. 147, 152.

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necessary; and he held that there was no acceptance, and so the gift was ineffectual. The result is sufficiently startling. It would appear that according to the decision of the District Court though the donee (or the person representing him) may take possession of the subject of gift, yet this is not sufficient to imply an acceptance of the gift by or on behalf of the donee. The District Judge arrived at this conclusion apparently without realizing the inconsistency to which it leads, because he misapprehended the principle that underlies the decision in *Humera* v. *Najam-un-nissa* [1]. In that case everything had been done to transfer possession, except that the donor had not left the premises (forming part of the subject of gift) on which she was living jointly with the donee. It was there held that the donor having emphatically manifested her unequivocal intention to transfer possession, and having done everything else to transfer possession, the fact that she did not vacate the house forming part of the subject of the gift but continued to live in it, was sufficiently explained and it did not vitiate the transfer of possession which was otherwise complete and effectual.

In the view that the District Judge took, he asked for a finding on the issue "whether 2nd defendant was or was not *de facto* guardian of the 3rd defendant at the time of the execution of the deed of gift, Exhibit I." The object of this issue appears from the judgment of the District Judge delivered when he accepted the finding returned by the District Munsif. On reading the District Munsif's finding however it is difficult to understand what exact significance the issue had for the District Munsif, and in what way he conceived the matters contained in his judgment to be relevant to the rights and liabilities of the parties. Their Lordships of the Privy Council had occasion in *Mata Din* v. *Ahmad Ali* [2] to encounter the notion that by the use of expressions taken from English law especially, it may be added, if they include some Latin words such as the expression "*de facto* guardian"—parties can be clothed with legal powers which they do not otherwise possess.

In the present case too it seems that under some similar notion the Lower Courts have not considered the case on the broad principles of the law, but have strayed into questions which do not materially aid the final decision. Had the general principles been applied in a plain common sense manner, the case

1. (1905) I. L. R. 28 A. 147. 2. (1912) I. L. R. 34 A. 213, 222.

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would have admitted of a much more satisfactory and intelligible method of decision.

Under Muhammadan Law (1) a transfer by way of gift must be completed by the donor. He cannot be forced to complete a gift which he has not completed. Transfer of ownership includes a transfer of the right of possession, and of enjoying the benefits arising from the property. When therefore transfer of ownership is purported to be made, it is not complete unless transfer of possession is also made. (2) It follows that if the donor has not given possession of what is alleged to be the subject of the gift, the alleged donee cannot on the strength of the declaration of gift, claim to be the owner of the property and as owner obtain possession of it through the Court or otherwise without the consent of the donor or his successor in title. The donee cannot say: "I have had the ownership transferred to me, give me possession." The answer to this claim would be: "The complete ownership is not in you. One part of ownership is the right to possess. That right has not been transferred to you. It is the donor alone that can transfer that right to you and thus complete your ownership." In short unless the donor transfers possession, the transfer of ownership itself is not complete. (3). If however, the subject of the gift is already in the possession of the donee at the time of the declaration of gift, its possession cannot be transferred to him any more. All that is then needed for transferring the ownership, is that the donor should transfer to the donee the residuum of the rights making up the complex notion of ownership. This he can do by declaring that thenceforth the subject of the gift shall be possessed by the donee as his own property. (4) Where the donee is a minor who, though capable of owning property, is not able to be in possession of it, his place is taken by the person who in accordance with law is in charge and possession of the minor's property. (5) If a person therefore declares his intention to mak a gift to a minor, the donor cannot be forced to carry out his intention. He may do so of his own accord, but the declaration of the intention to make a gift does not of itself give the minor donee a right to insist that the declaration should be given effect to. (6) No doubt in this case also if the subject of the gift is already in the possession of that person whom the law entrusts with the care of the property belonging to the minor, the gift can require no further completion by a transfer of possession—indeed it would admit

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of no such transfer. The change would be in the mind with which possession would be held, and not in the person who has actual physical possession of or control over the subject of gift.

There is no difficulty in understanding these propositions. The facts of any particular case may, it is true, sometimes make them somewhat difficult of application, but not on that account abstruse or dissociated from what is referred to in the Indian Evidence Act as the "common course of natural events, and human conduct." Where for instance the person in actual care of the property of a minor donee is other than he who in accordance with law is under the obligation (and who is clothed therefore also with the corresponding right) of being in possession of the minor's property—in other words where the person actually in possession of the minor's property is not the legal guardian of the minor's property—in such a case if the property is transferred to the possession of the legal guardian it may be objected that the facts were such as to show that the property intended to be given to the minor would not ordinarily be placed in the possession of the legal guardian: the person actually in possession of such property being another. If, on the other hand, possession is in such a case transferred to the latter (*i. e.*, to the *de facto* guardian) it may be objected that the transferee is not legally entitled to hold possession of the property on behalf of the minor, and that the possession of the transferee is not in law the possession of the minor.

It must however be always remembered that the question of possession is primarily one of fact and it must refer to "possession of that character of which the thing is capable." *Lord Advocate* v. *Young* [1]. There may, it is true, occasionally be some difficulty in determining whether or not possession of the property was held by or on behalf of the donee after the declaration of gift. But the difficulty can seldom be lessened by attention being primarily directed not to the salient facts of the case, not to the question who or on whose behalf acts of ownership were exercised over the property, after the gift and who was deriving the substantial benefit from it, but to other speculative aspects supposed to have some juristic connection with these questions of fact. The difficulty may be enhanced by trying to determine the question, with reference to the existence of relations which are still more obscure.

1. (1887) 12 A C. 544, 556.

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In the present case it is admitted that the 1st, 2nd and 3rd defendants lived together in the same house. The subject of the gift consisted not of the house in the common occupation of the donor and donee, (as in *Humera Bibi's* case) but of a field and in the words of Domat, "one possesses lands by cultivating them, reaping the fruits, going and coming through them, and disposing thereof at pleasure." Attention should therefore have been directed in this case to the person for whose benefit these acts were performed. As the alleged donee was a minor he could not perform them himself. The question of the *de facto* guardianship *i. e.*, the question as to which inmate of the house was in the actual care, of the minor, could not materially affect a gift of this kind; for it is not as though a gift of movable property capable of being in direct and personal control had been transferred to a person other than the guardian of the minor either by error as to the person to whom the transfer should according to law be made or because such transfer would immediately and more effectively provide for the subject of gift being utilised for the benefit of the minor; nor has this question arisen in the endeavour to discover the destination of the actual produce of the land. In the arguments before us the finding that the 2nd defendant was not the *de facto* guardian of the minor was recognised to be irrelevant, and not relied upon by either party.

The real question in this case whether after the gift the donee was given the benefit of the subject of the gift or whether its produce continued to be taken and dealt with by the donor and applied to his own benefit just as he had done before making the gift, has been lost sight of. The second appeal had therefore to be argued without having had the case considered by the Lower Courts in its real and substantial form, but through an endeavour to find a mode of decision irrespective of a finding on that essential question.

In this endeavour the case has been presented before us in two aspects.

First it was argued that the intention of the donor was to defraud creditors and it could not therefore be lawfully effected. The objection that the gift was in fraud of creditors (though it was casually alluded to by the District Munsif as stated above), was not referred to in the plaint. The gift is specifically set up in the written statement of the 2nd defendant, yet the contention

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was not made the subject of an issue. The words of Peel, C. J. in *Doe Dem Ramtonoo Mookerjee* v. *Bibee Jeenut* [1] seem therefore to be directly applicable. He says: "This deed then being of a prior date, the subsquent purchaser must impeach it for fraud; all those grounds on which a deed is generally impeached are, however, wanting in this case. There is no evidence before us that the donor was in debt at the time of making this gift, nor is there any evidence to show, that he executed it in contemplation of insolvency, or with a view to defraud creditors."

On the other hand, on behalf of the appellant and in support of the gift it was argued that the gift being from a grand-father to his minor grand-son, no transfer of possession was necessary and that therefore proof of Exhibit I was sufficient to establish the gift.

In connection with this last contention it must first be considered whether the rule is available to the 3rd defendant and if so, to determine the effect of the rule by a consideration of its scope.

It is urged that the 3rd defendant cannot rely upon the rule because a gift to a minor must be transferred to his father if the father is "alive and present" (Baillie's Digest 1st Edition, Vol. I, 530) and in the case under consideration no such transfer is alleged: but that on the contrary the written statement of the 2nd defendant alleges (paragraph 4) that the possession was delivered to the 3rd defendant himself. That allegation taken literally is meaningless: a boy of 7 years old cannot take possession of a field. It is explained, however, that possession was taken on behalf of the minor by the grand-father, or in other words that transfer of possession was unnecessary. This explanation is inadequate to bring the gift within the scope of the rule. That rule is concerned with one special aspect of the general rule that transfer of possession is necessary for completing a gift—that special aspect having reference to the fact that the guardian of the property of a minor is the donor, and the minor the donee. The present case is not such.

The question is always whether the requirement of the law that the donor shall do everything to transfer all the rights making up ownership (including transfer of possession) has been complied with either by placing the subject of gift in the immediate personal control of the donee or by some act which operates to bring

1. (1843) Fulton, 152, 154.

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about the same result. The rules of law relating to possesions appear abstruse and complex owing to the failure to direct the enquiry to the ultimate use to which the subject of gift has been put and to determine whether or not it was the donee who has derived benefit from the property after the gift. The law is not made up of unmeaning technicalities. It is not abstruse and removed, from the common course of events and human conduct. The 3rd defendant has failed to come within one particular rule (that gifts to minors shall be transferred to their guardians). His failure arises from the fact that that rule is not applicable to the circumstances of this case. But a gift to a minor which in all essentials has been completed, cannot fail merely because the person who has taken charge of the subject of gift on behalf of the minor is not his father. This would be contrary to all principle and authority. The donee can authorise a third person to take possession of the gift on his behalf. Conversely the donor can give possession to a 3rd person on behalf of any donee. If any authority were needed for these propositions it may be found in the 11th chapter on the book on *Hiba* in the Fatawa Alamgiri. A person accepting possession in such circumstance would in the majority of cases occupy a position not distinguishable from that of a trustee on behalf of the donee.

These provisions cannot be applied less favourably to a minor than to one of full age; and it has been held by a bench which included Abdur Rahim, J., that where a lady purported to make a gift to her minor paternal grand-child and "stated in the deed of gift that she would remain in possession of the property as guardian of the minor, and on his behalf," it was necessary to have a finding as to whether the grand-mother was at the time of the gift in possession, on the assumption that if she was, her possession might be transformed by her own acts, into possession on behalf of the donee though as the father of the donee was alive, (he was the 2nd defendant) the paternal grand-mother could not by any act on her part make herself the guardian of her grand-child (*Fakir Nynar Muhamed Rowther* v. *Kandasawmy Kulathu Vandan* [1]. The decision in that case was ultimately against the validity of the gift, as the finding was that the donor was not herself in possession.

Had the donor been found to have been in possession, the validity of the gift would still have depended on the further question

1. (1911) I. L. R. 35 M. 120, 123.

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whether after the declaration of gift the donor had transformed her possession on her own behalf into possession on behalf of the minor as his guardian by applying the benefits of the subject of gift to the donee, or whether she had continued to apply them to her own use. For if she had continued to apply the gift to her own use, the gift would have been liable to attack from two directions.

First it would be very unreasonable to hold, in the absence of some explanation, that the transaction is real or that there is any intention to make a gift, when it is found that as a matter of fact the person who purports to hold himself forth as the donor, and as having ceased by his voluntary act to have any interest in the property, has continued without interruption to use the property exactly in the same way as before the gift, and has not permitted the donee even at the moment of the gift to have any more benefit from the subject of gift than before. The ostensible object of the gift is that the donee should take all the benefit and the donor should cease to take any. There being on the one side the words of the donor, and on the other his acts, there would seldom be any difficulty in deciding which represents his true intentions. And the legal results of the fact that there is no intention to make a gift, coupled with the facts that the donee has not derived any benefit from the subject of the gift, is that the donor is entitled to continue as he has been continuing, in possession and enjoyment: and that the previous declaration of gift is nugatory, because it has not been followed by a transfer of ownership which implies a transfer of possession. This result is strictly in accordance with the theory of the law of gift, as appears from *Rahiman Bi* v. *Mahomed Fatima Bibi* [1] where the question was whether the rule that gifts to minors from the guardians of their property are complete by the declaration of gift (provided that the subject of the gift is under the control of the guardian at the time of such declaration) was in itself a sufficient answer to the objection that the gift had never been completed. The donor there was the father of the donee, and had purported to reserve to himself what in effect was a life-interest. The facts of that case were therefore very different from those with which we have to deal here. The considerations referred to in that case however in so far as they affect the decision of the questions (1) whether the donor did in fact intend to transfer the ownership from him-

1. (1914) 16 M. L. T. 315.

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self to the donee and (2) whether he effectuated such transfer are of general application.

Secondly even if the Muhammadan law were otherwise, it would, to adopt the words of Holloway, J., be very inequitable to allow the visible means of a man to be narrowed down by a transaction not evidenced by contracts *Husain Khan* v. *Nateri Srinivasa* [1]. Holloway, J., was dealing with the converse case. But the principle to which he referred is applicable.

It is obvious that the rule should not be so applied that in the changed circumstances of modern life, it should be manipulated to such inequitable purposes. The object of the rule is to prevent a minor from being rendered incompetent to receive a gift from his guardian. It is not the intention of the rule to enable a minor to insist on a gift being completed in his favour which was not in fact completed by the donor and which was perhaps never intended to be completed. Still less is it the object of the rule to enable the guardian of a minor to continue in possession and enjoyment of property, and yet as against third parties to set up a gift in favour of the minor. In such circumstances the third parties may reasonably claim that the property must be dealt with on the basis that it continued to belong to the alleged donor, who exercised all the rights of ownership over it, after purporting voluntarily to part with his rights over it.

It is necessary for these reasons to have a finding on the question whether at or after the date of Exhibit 1 and as the result of the gift referred to in it, the produce, or the income or other benefit derived from the alleged subject of the gift was applied to the use of the donee so as to show that a transfer of ownership had been made or whether it was continued to be applied in the same way as it was before the alleged gift.

The finding should be submitted within six weeks and seven days are allowed for objections.

[In compliance with the above order, the District Judge of Cuddapah submitted a finding "that the produce of the land or the income or other benefit derived from the alleged subject of the gift was not applied to the use of the donee so as to show that a transfer of ownership has been made, and that it was on

1. (1871) 6 M. H. C. Rep 356, 358.

the contrary continued to be applied in the same way as it was before the alleged gift."

Their Lordships accepted the finding and dismissed the Second Appeal with costs.]

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Seshagiri Iyer and Mr. Justice Kumaraswami Sastri.

C. V. C. T. Chidambaram Chetty ... *Appellant* in all (Plaintiff's Assignee)*

v.

Ayyavu *alias* Muthukaruppan Thevan and others. *Respondents (Defendants).*

Chidambaram Chetty v. Ayyavu.

Madras Rent Recovery Act—Landlord and tenant—Kanganam and Kulevettu—Voluntary payments.

Kanganam and Kulevettu are in the nature of voluntary payments and cannot be recovered.

Second Appeals against the decree of the District Court of Ramnad in A. S's. Nos. 628 of 1910 and 31 of 1911, 622 of 1910 and 26 of 1911, 624 of 1910 and 27 of 1911, 625 of 1910 and 28 of 1911, 626 of 1910 and 29 of 1911, 627 of 1910 and 30 of 1911, 629 of 1910 and 32 of 1911, 630 of 1910 and 33 of 1911, 632 of 1910 and 34 of 1911, 634 of 1910 and 35 of 1911 preferred against the decrees of the Court of the Special Deputy Collector of Ramnad in S. S's. Nos. 697, 673, 689, 691, 693, 696, 699, 703, 712 and 714 of 1909 respectively.

Suit for recovery of rent.

The main contention in the suit was whether the tenants were liable to pay sarasari on certain Samudayam Karisal lands in their holding the plaint claim in respect of other nunjah and punjah lands being admitted-which the plaintiff, landlord alleged was faisal nanjah but was subsequently cultivated for a long time with cotton and chillies owing to scarcity of water. The plaintiff contended that the tank had been since repaired, and the irrigational facilities restored, and that the tenants were bound to cultivate with paddy and pay waram or sarasari. He claimed a right to revert to the waram system. He claimed also certain cesses Vamadai Vaikkal Kattu, Shekharam Pattarai Poraswathantram, Kanganam, Kulevettu, betel-nuts and curd. The defendants contended that the lands were punjah, that they were cultivated with punjah crops only, and that a uniform money

* S. A. Nos. 2057 to 2066 of 1912. 3rd August 1914.

rate was being paid for them for a long time for cotton and chillies. They also disputed their liability to pay any of the cesses in respect of the said lands in their holding.

The Court of First Instance found that the lands were faisal nanjah lands and that the tenants were liable to pay sarasari. It disallowed Shekharam Pattarai, Vamadai Vaikkal Kattu on the ground that they are voluntary payments; similarly betel-nut and curd. Kulavettu was disallowed on the ground that the tenant was only bound to contribute Kudiwaramat labour. As regards Kanganam he held that it was not payable in respect of Varisaipathu lands but is payable in respect of Varampathu lands as the claim was one under Act VIII of 1865. Without upsetting this finding the Lower Appellate Court held, that as in previous years only a money rent had been collected for the said crops on the said lands, plaintiff was entitled to recover only the same rent. It also held that on its finding that only a money rent was payable, the plaintiff could not levy either Kanganam or Kulavettu, or other cesses claimed. On Second Appeal objection was taken to the disallowance of all the cesses.

T. Rangachariar and *K. V. Krishnaswami Iyer* for Appellant.

B. Sitarama Rau for Respondents.

The Court delivered the following

Judgment:—In these Second Appeals the District Judge is apparently of opinion that Issue II covers all the lands in dispute. The defendants in the various suits have not denied the correctness of the account annexed to the plaint except with reference to the Samudayam lands. For the purpose of this Appeal we must take it that the dispute between the parties is confined to the Samudayam Karisal lands on which dry crops were raised.

Mr. T. Rangachariar argues that as it has been found by the Sub-Collector that the Samudayam lands were included in the wet ayacut and as the said finding has not been upset in appeal it follows that when the landlord repairs the tank and makes it possible for the tenant to cultivate nanjah crops, wet assessment is payable. The decision in *A. R. L. Lakshmanan Chetti* v. *Kolandaivelu Kudumban* [1] which he relies upon is no authority for this contention. In that case it was found that an original

1. (1883) I. L. R. 6 M. 311.

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wet assessment was payable which was given up owing to the tanks not being repaired. The learned Judge held that the landlord was entitled to go back to the wet rate after the repair. There is nothing in the case before us to revert to. The entire evidence shows that for a long time a definite and uniform rate of money payment was made regarding chillies and cotton. Therefore the principle in *Venkatagopal* v. *Rangappa* [1] applies, and the Court below was justified in presuming an implied contract. The decision in *Parthasarathi Appa Row* v. *Chevandra Venkata Narasayya* [2] has no bearing. In that case there was no uniform rate of payment.

We agree with the District Judge that the tenants are not bound to pay anything for Kanganam or Kulavettu in reference to Samudayam lands. They are in the nature of voluntary payments. Mr. T. Rangachariar says that Second Appeal No. 2062 of 1912 has been settled and does not press it. It is dismissed with costs.

We dismiss the other Second Appeals with costs subject to the modifications that the parties will bear their own costs up to the order of remand. (Vide Mr. Evan's order in paragraph 3 of the order of remand.)

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1. (1883) I. L. R. 7 M. 365. 2. (1910) I. L. R. 33 M. 177; 20 M. L. J. 596.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Mr. Justice Coutts-Trotter and Mr. Justice Srinivasa Aiyangar.

S. V. A. R. Vellayam Chetty and others. ... *Appellants* (Defendants 1 to 5)*

v.

K. L. S. T. Kulandaveluappa Chetty ... *Respondent (Plaintiff).*

Vellayam Chetty *v.* Kulandavelappa Chetty.

Principal and agent—Contract—Agreement to pay something for collection of old debts without specifying amount—Whether enforceable—Test—Nattukottai Chetti—Practice—Duty of agent.

Where a Nattukottai Chetti principal promised to give his Burma agent something as remuneration in respect of sums collected from his old debtors without specifying the amount and it was contended that such a contract was not enforceable.

Held in law that it is a question depending upon the circumstances of each case whether an alleged agreement of this sort constituted an unqualified contract to give something or whether the party agreeing had the option of giving anything or nothing at all; in the one case there being an enforceable contract and in the other, no cause of action at all if he chose not to give anything.

Held in the circumstances of the case there was such a contract.

According to the custom of Nattukottai Chetties, the duty of the agent sent to transact money-lending business does not extend to collecting old debts which he is not willing to take over from his predecessor and he is entitled to special remuneration for the collection of such debts.

Appeal against the decree of the Court of the Temporary Subordinate Judge of Sivaganga in O. S. No. 19 of 1912.

A. Krishnaswami Aiyar for Appellants.

T. Rangachariar and *A. Srinivasa Aiyangar* for Respondents.

The Court delivered the following

Coutts-Trotter, J.

Judgments :—*Coutts-Trotter, J.*—This was an action brought by a Chetty Agent carrying on business on behalf of his principal in Lower Burma for something which may be described as commission. The circumstance in which this agent was appointed is in a document dated 20th January 1907, which is what I understand to be an ordinary form of agreement between a chetty agent and principal. He was to go to a place called Letpatam and transact business as he agent of his firm in that place for a period of 3 years for a fixed salary of Rs. 8,000. He was to remain there and transact business

*A. S. No. 119 of 1914. 21st September 1915.

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for a period of 3 years and hand over the balance of capital and profits left in his hands to his successor. These were the terms of the document. It would appear that in fact the principal's business in that place had been faring very ill for a few years previously, apparently because of the incapacity of the preceding agent and it may very well be that the principal's mind was (as he swore) that he doubted his ability to enable the new agent to embark at any rate with rapidity on new transactions and always had in his mind that his duty would be to collect the outstandings left uncollected by his predecessor if he could be got to do, so— *I say advisedly* "if he could be got to do so," because there is evidence in this case of the principal's agent at Rangoon who says "It is the custom among Nattukottai Chettiars to transfer to the name of the successor such outstandings as he is agreeable to". The agent has said in the box and on paper contemporaneously over and over again that he went out with the expectation of doing ordinary money-lending business as a Chetti agent which is quite evident from a letter dated 6th June 1907 which is the first letter that was written to the defendant by the agent in which he says "you said you would keep Rs. 26,000 as capital for the place, but you have not as yet written about it even though I wrote a letter from this place. Therefore you must write to this place to enter that sum in the accounts and send Rs. 75,000 over that amount so as to make the capital one lakh of rupees." What was that capital wanted for? Not to collect old debts but for the purpose of doing business with new clients. In that letter he also says "we must have dealings with good persons who may be coming voluntarily at a cheap rate of interest and in small sums. We must also be carefully collecting the old dues." The next document is dated 3rd August 1907. It is from the principal to the agent in which he presses him to collect the old dues to the prejudice of other business. It is in effect an exhortation to the agent to get on as fast as he could with the collection of the sums due under old accounts.

The next letter is Ex. IX which is a very important letter dated 17th June 1908 written by Udayappa to the plaintiff in which there is an allusion to the question of commission claimed by the agent. I think it is quite clear that at this time there was no binding agreement at all as between the principal and the

agent as to whether there should be any or what rate of commission. He writes to the plaintiff alluding to his claims, "As you have now written severely I would send your letter home to the principal and make the necessary arrangements therefor. Our principal is not one who cannot realise the situation" and then he says "You have now very severely written in your letter that you are very anxious about it and that you came here only for profits and good name and not in consideration of the pay; therefore I shall write to the principal as per your desire and have the thing settled as per your desire. Do not be anxious about it and make arrangements necessary for the collections." Does not that amount to an intention on the part of Udayappa to write to the principal for payment of the commission due to him? I certainly draw the conclusion that he did write such a letter. It is an undisputed fact that the principal has not chosen to produce it. Inasmuch as he has not produced any of the correspondence between himself and his agent at Rangoon, we are bound to draw adverse inference against him wherever it is clear that the production of that correspondence would throw light on the case. At that time it is clear that no binding agreement had been come to and it was not come to until a considerable time later, because, as late as 3rd September 1908, plaintiff writes to the defendant and says "We write to you with the intention that we may ask what we want. We are persons who have come depending on you. In many places in these days they are settling commission beforehand for making collections. Vai V. B. has arranged for commission for the partner of Pakke. As some provision has been made for all persons in this manner, we write to you often and often and request you will similarly make some provision for us who have been depending on you." In these circumstances we may rightly draw the inference that as late as that date there was no binding agreement between these parties although pressure to induce the principal to agree to something had been going on for a certain period. The next document is also an important one and is dated 12th November 1908. It is another letter from the plaintiff to the defendant. There are two requests in that letter. One was a request for *extra* help from the defendant on the ground that the work of collecting the outstandings had become so arduous that it was impossible for one man to cover the ground. The other request was to have

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his commission settled. He says "You must consider well about the fact that I collected money after much difficulty and write to me as to what I am to take for my commission. I write to you very much and request you to realise the fact that money has to be collected only after much hard work. If you have no mind to give commission, it will be a good thing for you to send a man for my place at the end of the second year." "You must send a man like that"—.That is a statement on the part of the plaintiff that he was doing work which he had not contracted to do and that unless settlement was come to with regard to the rate of remuneration he would give up the business. The next communication we have is Ex. X dated 1st December 1908 written by the principal in answer to this letter and also to another which we have not got. He says he will send a person to help him. That is in answer to the first request. He says this:—"You have been writing to me that I should write about your matters. You may discuss about this also with Udayappan of Rangoon. You may tell Udayappan about K. P.'s house matter." Beyond that there is not a word said about his commission and not a word said about the plaintiff's threat that if he was not properly treated with regard to his commission he would demand to be relieved at the end of the second year. After the date of that letter the correspondence ceases right up to a period when the plaintiff was due to come home in the natural course of effluxion of the period of his contract. We may assume that the letters covering the intermediate period have no bearing on the issue of this case. In the first letter dated 14th July 1910 Ex. E written by the plaintiff to the defendant he says this, "Much trouble has been taken from Peri accounts and things have been very satisfactorily brought to such an extent as this. It is you who should give considering the pains taken in accordance with what you wrote formerly that you would give liberally." In Ex. D on the 6th August 1910 he again writes "you had written formerly that you would also (reward) me liberally for collecting amounts taking pains. You are the person who should reward well according to the pains taken; and I am a man who would receive the same. With that object, I have done all the work taking great pains." I infer from these two letters that the principal must have assented to reward the agent in general terms. At the trial, the case set up by plaintiff was thus:—that he had gone to Rangoon that

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he had met Udayappan who had authority from the principal in the matter and that Udayappan settled with him that he should get 5 per cent. commission. The learned Subordinate Judge disbelieved this story and found that it was not proved that Udayappa and plaintiff ever entered into any such binding agreement: but he finds that there was some understanding between plaintiff and Udayappa that some commission would be paid. Udayappa in his deposition says that he wrote to his principal about the samans due and he replied that he would not give samans having regard to what people were talking about. What the principal meant, in my opinion, was that he would not give him a fixed rate of percentage but would give him something as remuneration in respect of the sums collected from the old debtors.

That being so, the question arises whether this would constitute in law an enforceable contract. Reliance was placed for the Appellants on two cases. *Taylor v. Brewer* [1] and *Roberts v. Smith* [2]. In these cases, it was held that a promise to pay reward to deserving persons may be construed in certain circumstances with certain form of words to mean "I may or may not give anything. If I do give something I will give exactly what I deem right." On the other hand, the other side relied on the case of *Bryant* v. *Flight* [3] where slightly different words were held to mean "I will give you something though that something must be determined later." The dividing line may be different in particular cases. The principle is quite clear. Is there an unqualified contract to give something or is the option of giving anything at all left to the discretion of the proposed donor. I do not think there is much to be gained by a lengthy discussion of the cases. It is a matter of construction on which different judges will take different views. The view I take of the contract in this case is that it can only be construed having regard to the circumstances as an undertaking to give something. I see no express contract in this case. Mr. Krishnaswami Iyer, Vakil for the appellants, contended that there cannot be a contract and that we cannot find it in the pleadings, issues, letters or depositions. I have already said that I think it can be found by diligent and patient study in the pleadings. It is rather disguised. It can be dug out. What I do find is this. It is in terms of

1. (1813) I M.L.J. 290. 2. (1859) 4 H. & N. 315,
3. (1839) 5 M. L. W. 114.

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the judgment of the learned Subordinate Judge in paragraph 11 of the judgment where he specifically finds an implied contract to pay something to the plaintiff. He is inclined to find it in the deposition of Udayappa which I read. He assumes that having heard from the 1st defendant that he was going to pay plaintiff a percentage in the profits, Udayappa must have told the plaintiff about it at his request and that that knowledge or conversation implies a contract. But I would base my inference as to the contract on a slightly different ground. The silence on the part of the defendant after he received the letter of the 12th November 1908 would itself constitute an implied agreement, to pay some rate of commission to the plaintiff if he consented to go on with the work of collecting old debts. My inference as to the contract is also based on another ground, namely, from the uncontradicted letters Ex. D and E in which the agent expressly states that the principal had given an undertaking to pay him handsomely coupled with the fact that no letter is produced by the defendant of protest that this was not a true account of what he wrote. Mr. Krishnaswami Aiyar argued that it is void for want of consideration because by the terms of original salary chit the plaintiff was bound to know that there was no consideration for extra remuneration. I think his argument is fallacious, because though it may very well be that the expression "transacting business" would cover certain items of collections, they would only cover such items of collections as the agent agreed to take over. Transacting business in law cannot be held to cover cases of collections only and no business at all especially having regard to the known facts of the business of Nattukottai Chetties. In view of the very nature of the duties imposed upon the plaintiff there was ample consideration for extra remuneration.

This disposes of the case and there is no need to go into the question of custom as the only point urged is as to the contract. As to the quantum of remuneration the Subordinate Judge has very rightly come to the conclusion that 5 per cent. is a reasonable amount and I think his decision should not be interfered with. The appeal fails and is dismissed. Each party shall pay his own costs.

Srinivasa Aiyangar, J.

Srinivasa Aiyangar, J.—I entirely agree.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present.—Mr. Justice Spencer and Mr. Justice Seshagiri Aiyar.

Tiruvenkata Chariar ... *Appellant* * (*Auction Purchaser*)

v.

Thangayi Ammal and another ... *Respondents* (*Petitioner and insolvent*).

Tiruvenkata Chariar *v.* Thangayi Ammal.

Provincial Insolvency Act S. 22—Official Receiver—Sale by—Jurisdiction to set aside—"Aggrieved"—Unsecured creditor an aggrieved person.

S. 22 of the Provincal Insolvency Act gives unfettered discretion to the Court to set aside orders passed by the Official Receiver. The Court has, therefore, power to set aside an improper sale by the Receiver.

An unsecured creditor of the insolvent is a person "aggrieved" by such sale and can apply to the Court to have it set aside.

Appeal against the order of the District Court of Tanjore in I. A. No. 168 of 1914 in I. P. No. 13 of 1913 (in I. P. No. 90 of 1910 on the file of the Official Receiver Court, Tanjore).

T. Rangachariar and *R. Rangachariar* for Appellants.

R. Kuppuswami Aiyar for Respondents.

The Court delivered the following

Judgment:—The Official Receiver of Tanjore, in whom the property belonging to the insolvent vested under an adjudication order, issued a proclamation for the sale of the properties in dispute. In it he stated that the properties would be sold subject to two mortgages subsisting in favour of certain secured creditors. The sale was fixed for the 21st March 1914. On that day the Official Receiver noted in the sale proclamation "Intending bidders present say that the properties would fetch a better price if they are sold free of mortgage. Under these circumstances in modification of the terms of the sale proclamation, I propose to sell now the properties free of encumbrance." The properties were purchased by the appellant for Rs. 22,000. This was on the 22nd March. On the 9th of April an application was made to the District Court by the respondent, who is also one of the creditors of the insolvent, for setting aside the sale on the ground that the variation in the sale proclamation was irregular, and that if the properties had been advertised to be sold free of encumbrance, a larger number of bidders would have been present, that she was prejudiced by the action of the Official Receiver in directing the sale at the last moment free of encumbrance, and that there was an offer of Rs. 25,000 for the property. For the above reasons she prayed that the sale be set aside and

* A. A. O. 174 of 1914. 9th March 1915.

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that a fresh auction be held in respect of the properties. The District Judge was of opinion that the procedure adopted by the Official Receiver was irregular and that there was good ground for the allegation that the creditors were prejudiced by the variation in the proclamation of sale, and set aside the sale.

In appeal Mr. Rangachariar raises three objections to the order of the District Judge. In the first place he argues that the District Judge had no jurisdiction to set aside the sale held by the Official Receiver. He draws attention to S. 20 of the Provincial Insolvency Act which gives the receiver full discretion to sell property and to grant receipts by clauses (a) and (b), but which restricts the powers of the Official Receiver in regard to other matters in the subsequent clauses by directing that he should obtain the sanction of the Court. Clauses (a) and (b) of S. 20 correspond in a general way to S. 56 of the Bankruptcy Act, whereas clause (c) downwards have been adopted from S. 57. Both these sections are subject to the general power of supervision, retained by the Courts in England under S. 90 of the same Act. S. 22 of our Act has a similar provision. Whereas clauses (a) and (b) of S. 20 contemplate the exercise of ordinary powers which are incidental to the management of an insolvent's property which are calculated to throw an onerous obligation on the estate itself. It is for that reason that the previous sanction of the Court is considered necessary before the Receiver is allowed to exercise those powers. In either case, whether a power is exercised without obtaining the sanction of the Court or after obtaining its sanction, the general superintendence possessed by the Court to correct irregularities committed by an officer of the Court is not affected. Mr. Rangachariar contends that the decision of the Receiver acting under clause (a) is not controllable by the Court. We are unable to agree with this contention. The 1st clause of S. 20 says: "Subject to the provisions of the Act the Receiver" shall do certain things, and when we come to section 22 we see that liberty is given to "any person aggrieved by any act or decision of the Receiver to apply to the Court which may confirm, reverse or modify any act or decision complained of". It is true, as pointed out by Mr. Rangachariar, that S. 31 of the Indian Insolvency Act of 1848 prior to its amendment and consolidation with the Presidency Towns Insolvency Act of 1909 was held by the Bombay High Court *in re Bhukandas Lallubhai* [1] not

1. (1905) 7 Bom. L. R. 954.

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to enable the Court to interfere with a sale made by the Official Assignee. In that section the same unlimited power of interference which is given by S. 22 of the Provincial Insolvency Act is not to be found. But none the less it seems to us that even under S. 31 of the Indian Insolvency Act it was open to the Court to entertain applications against a sale held by the Official Assignee if it was irregular and unauthorised. In *Woonwalla & Co.* v. *N. C. Macleod* [1], the final decision is made to rest upon the ground that the Court is not bound to interfere because it is discretionary to do so. It may be open to question whether this decision should be followed in cases arising under the Presidency Towns Insolvency Act as it stood prior to its amendment. But we have no hesitation in holding that the language of S. 22 of the Provincial Insolvency Act is clear and unambiguous and gives unfettered discretion to the Court to set aside the order passed by the Official Receiver.

The second objection relates to the undesirability of overruling the Official Receiver in matters which are within his competency. The District Judge points out that the change in the conditions of the proclamation without giving sufficient notice of it had the effect of preventing intending bidders from coming forward. An affidavit was filed in the Court below by the respondent's agent which says that one Srinivasa Iyer had offered to purchase the property for Rs. 25,000 and that the said intending purchaser has already made a deposit of 25 per cent. of the purchaser money with the Receiver. Under these circumstances we cannot say that the District Judge on the materials before him did not exercise his discretion properly. In *Ex parte Lloyd: Re Peters* [2] all that was held was that the discretion of a Trustee will not be interfered with unless it is shown that he has acted "as no reasonable man would." It is not an authority for the proposition that where proper reasons are given by a Court for holding that the action of the receiver was irregular and had prejudiced the general interests of the creditors, it should not set aside the order passed by the receiver.

The third objection of Mr. Rangachariar is that the petitioning creditor the respondent is not an aggrieved party under S. 22 of the Provincial Insolvency Act. He relies upon a judgment of the Calcutta High Court reported in *Hansesuar* v. *Rakhal Das* [3].

1. (1906) I. L. R. 30 B. 515. 2. (1882) 47 L. T. 64.
3. (1913) 18 C. L. J. 359.

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In that case a stranger, not a creditor, who had been injuriously affected by the procedure adopted by the Official Receiver was held not to come under the designation of 'persons aggrieved.' Mookerjee, J., quotes the language of James, L. J., in *Ex-parte Sidebotham, in re Sidebotham* 1 and points out that a third party had his remedy by way of suit, and that no act of the Receiver can conclude his title; he came to the conclusion that he was not a person aggrieved under the Insolvency Act. In the present case the respondent is a creditor and the fact that she happens to be an unsecured creditor is a point in her favour. It was pointed out in *re Langtry: Ex parte Stephenson* 2 that a creditor, though he had not tendered his proof at the date of the order, was a person aggrieved with reference to a scheme of arrangement which injuriously affected the rights of creditors. In *re Lamb: Ex parte The Board of Trade*3 Lord Esher points out that any person who is brought before the Court to submit to a decision is, if the decision goes against him, a person aggrieved; and he refers to his own decision in *Ex parte Official Receiver* 4 where he explains the language of James, L. J. in *Ex-parte Sidebotham, in re Sidebotham* 1, as meaning 'a man against whom a decision has been pronounced which has wrongfully refused him something which he had a right to demand.'

In the case before us the creditor is entitled to a decision in respect of the sale of the property of the insolvent, and she is certainly a person who would be damnified if the decision goes against her. Therefore in the language of Lord Esher she is a person aggrieved. We must hold for these reasons that the decision of the District Judge is right and that this appeal should be dismissed with costs.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Ayling and Mr. Justice Phillips.

G. G. Jeremiah ... ... *Appellant* in Crl. App. 487 of 1915. Petitioner in Crl. R. C. 514 of 1915. (Accused).*

Jeremiah *In re.*

Criminal Procedure Code, Ss. 260, 530—Bangalore District Magistrate—European British subjects—Power to try summarily.

The District Magistrate of Banaglore has no power to try a European British subject summarily and the trial is void under S. 530 Criminal Procedure Code.

Crl. A. 487 of 1915, and Crl. R. C. No. 514 of 1915.
*Crl. R. P. No. 409 of 1915. 26th October 1915

1. (1879) 14 Ch. D. 458.
2. (1894) 63 L. J. Q. B. 570; 70 L. T. 736.
3. (1894) 2 Q. B. 805.
4. (1887) 19 Q. B. D. 174.

Jeremiah *In re.*

Appeal against the order of the court of the District Magistrate and J. P. of the Civil and Military Station of Bangalore in case No. 5 J. P. of the Calendar for 1915.

Petition under Ss. 435 and 439 of the Code of Criminal Procedure 1898 praying the High Court to revise the order of the Court of the said Magistrate in the said cases.

L. A. Govindaraghava Aiyar, for the Appellant.

Public Prosecutor on behalf of Government.

The Court delivered the following

Judgment.—Appellant (a European British Subject) has been convicted by the District Magistrate of Bangalore who is a Justice of the Peace, of an offence under S. 8 of the Municipal by-law 3 after a summary trial, under S. 260 of the Code of Criminal Procedure.

Mr. Govindaraghava Aiyar argues in his behalf that the Magistrate's proceedings are void under S. 530 of the Code of Criminal Procedure in as much as the District Magistrate is not empowered to try a European British subject summarily. This appears to be so.

The Criminal Procedure Code does not apply primarily to Bangalore, which is no part of British India and is only in force there by virtue of Declarations of the Governor-General in Council in the exercise of powers conferred by the Indian (Foreign Jurisdiction) Order in Council, 1902. The latest declaration is No. 732 D. dated 19-3-1913 but this provides with reference to the Code of Criminal Procedure : "Nothing in the code as applied shall be deemed to apply to proceedings against European British subjects or persons charged jointly with European British subjects." The effect of this is to refer us back to an earlier declaration under the same authority, No. 680 I. B. dated 19-3-1912 which is still in force, and which regulates the powers of Justice of the Peace beyond the limits of British India in regard to European British subjects. This notification (issued subsequent to the decision of this court in (*The Public Prosecutor, Bangalore* v. *Marchant* [1]) confers on such officers certain specified powers among which the power of trying offenders summarily under S. 260 of the Code of Criminal Procedure is not included; and we must take it that the powers of the District Magistrate as Justice of the Peace as regards European British subjects are confined to those conferred on him thereunder.

It follows that the trial of the appellant was void.

1. (1910) I. L. R. 34 M. 346.

Jeremiah In re.

We set aside the conviction and direct the refund of the fine if paid. In view of the pettiness of the case, we do not order a re-trial under the ordinary procedure.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Mr. Justice Oldfield and Mr. Justice Tyabji.

Para Koothan and others ... *Appellants* * (*Defendants*)

v.

Para Kulla Vandu ... *Respondent* (*Plaintiff*).

Specific Relief Act, S. 9—Joint possession—Not within.

Joint possession cannot be decreed under S. 9, of the Specific Relief Act.

Hari Narain v. *Elemjan Bibi* [1] followed. *Sabapathi Chetty* v. *Subaraya Chetty* [2] referred.

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Appeal under S. 15 of the Letters Patent against the judgment of the Honourable Mr. Justice Sankaran Nair in C. R. P. No. 428 of 1912 preferred against the decree of the Court of the District Munsif of Panruti in C. S. No. 247 of 1911.

This was a suit under Section 9 of the Specific Relief Act, for the recovery of possession of 2 items of land described in the plaint schedule. The plaintiff alleged in the plaint that he had acquired right to the suit lands by enjoyment for more than 12 years prior to suit, and, as such, was ploughing and cultivating them every year, but that defendants took possession of them on 16th November 1910, after they had been ploughed by the plaintiff.

The defendants denied plaintiff's right to enjoy the suit lands, and contended, that, as he was not in possession of them within 6 months prior to the institution of this suit, it was barred by limitation, and added that the suit lands belonged to one Pavadai Asari who first usufructuarily mortgaged them on 14—11—10 to Jagannadha Reddi, and subsequently sold the same to him and that defendants got possession of them under a lease from Jagannadha Reddi on 15—11—1910 and have been enjoying the same since then. They further questioned the jurisdiction of this Court to try this suit, as the suit items belonged to the category of unenfranchised service Inams.

As regards the question of possession the following issue was framed by the Court. "Whether the plaintiff was in possession within 6 months prior to suit and was dispossessed by the defendants"?

The original finding of the Munsif was that the evidence on the side of the plaintiff as to possession within six months was

* L. P. A. No. 20 of 1914. 12th October 1914.

1. (1912) 19 C. L. J. 117. 2. (1881) I L. R. 3 M. 250.

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unreliable, that defendants' predecessor in title was admittedly in possession till 5—9—1910 and that even if plaintiff had ploughed the land once or twice between that date and 16—11—1910, he would have no right to maintain the suit as such an act could not be said to be an enjoyment that deserves protection under the Act. A revision petition was filed against the order.

The petition came on before *Sankaran Nair J.*, in the first instance on the seventh day of March 1913.

The Court delivered the following

Judgment:—The District Munsif states that if the plaintiff had ploughed the lands some day or days he would have no right to maintain the suit, as it is not the sort of enjoyment that requires protection. He does not say whether the plaintiff was in possession or not when he ploughed the lands or how he was able to plough the lands if he had no possession. He will submit a finding whether the plaintiff was actually in possession within six months before the date of suit; and if the possession is not such as entitles him to maintain the suit, what the nature of that possession is. The finding should be submitted in six weeks, and seven days will be allowed for filing objections.

[In compliance with the above judgment the District Munsif of Panruti submitted a finding to the effect that plaintiff was not in exclusive possession of the suit lands within 6 months previous to the suit; that he was only in joint possession of the suit lands with others of whom defendants' predecessor-in-title, Pavadai Asari was one, and that such possession did not entitle him to a decree.]

C. Krishnamachari for *G. S. Ramachandra Aiyar* for Petitioner.

K. V. Krishnaswmi Aiyar for *C. Padmanabha Aiyangar* for Respondents.

The Court delivered the following

Judgment:—The plaint was presented on the 28th April 1911. The plaintiff was in actual possession, but the defendant took exclusive possession on the 15th or 16th November 1911. This possession of the plaintiff is found by the Munsif to have been not exclusive but only joint with one Pavadai Asari who is found to be the predecessor-in-title of the defendant. The Munsif also states that even if he converted his joint possession into exclusive possession, it was a trespass and such possession will not be protected under section 9 of the Act.

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Thus the plaintiff alleges exclusive possession but it is found to have been joint possession with Pavadai Asari and the defendant took exclusive possession within six months before suit. The Munsif on these facts, was wrong in dismissing the suit. The plaintiff is entitled to be restored to the possession which he held before he was dispossessed by the defendant. Such possession may be or may not be in law joint possession with Pavadai Asari. But it was certainly not joint possession with the defendant. The defendant may be entitled to step into the shoes of his vendor but as the plaintiff claims to hold to his exclusion, he cannot be considered to be in a better position than a vendee from the plaintiff himself whose title to possession is not admitted by the plaintiff and who dispossesses him without his consent. I think he is now entitled to his decree under the Specific Relief Act. The decree of the Munsif is reversed and there will be a decree for the plaintiff with costs throughout.

An appeal was filed under the Letters Patent against this Judgment.

T. M. Krishnaswami Iyer for *C. Padmanabha Aiyangar* for Appellants.

G. S. Ramachandra Iyer for Respondents.

The Court delivered the following

Judgment:—The District Munsif no doubt found in terms against the plaintiff on Issue 1. But we understand the learned Judge as having been unable to accept parts of the judgment as reconcilable with that finding and as having therefore thought it necessary to obtain a proper finding after making sure that all material considerations had been dealt with. We are not prepared to hold that he was not entitled to do this in revision.

The question then is only of the propriety of the order he eventually passed, giving the plaintiff a decree with costs throughout, although the finding (accepted by him) was that the plaintiff was entitled to joint possession with the defendants. In *Hari Narain* v. *Elemjan Bibi* [1] it was held that a Court had no power to give joint possession under Section 9 of the Specific Relief Act.

In *Sabapathi Chetty* v. *Subaraya Chetty* [2] the decision was only that a person, whose possession has been partially disturbed, can be restored to possession under that provision. We follow the Calcutta decision, and allow the Letters Patent Appeal with costs, dismissing the Civil Revision Petition with costs.

1. (1912) 19 C. L. J. p. 117. 2. (1881) I. L. R. 3 M. 250.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Sir John Wallis, Kt. Chief Justice and Srinivasa Iyengar, J.

Sheik Ibrahim Rowther *alias* Chinnappa Rowther and others. *Appellants* * (*Defendants 1 to 4*)

v.

Muhamad Ibrahim Rowther and others *Respondents* (*Plaintiffs and Defendants 5 and 6*).

Sheik Ibrahim Rowther *v.* Muhamad Ibrahim Rowther.

Mahomedan Law—Labbais—Custom—Exclusion of females from succession—Proof of—Question of fact.

Held, upon the evidence that in the *Labbai* family in question the custom of following the rule of Hindu Law excluding females from right of succession prevailed *Mira Bivi* v. *Vellayanna* [1] not followed.

Under the provisions of the Civil Courts Act, it is a question of fact in each case as to what is the usage governing any family, *Kunhambi* v. *Kalanthar* [2] followed.

Mode and extent of proof of custom discussed.

Appeal against the decree of the Court of the Subordinate Judge of Coimbatore in O. S. No. 28 of 1909 (on the file of the District Court of Coimbatore).

L. A. Govindaraghava Aiyar and *T. M. Krishnaswami Aiyar* for Appellants.

T. R. Ramachandra Aiyar for Respondents.

The Court delivered the following

The Chief Justice.

Judgments:—*The Chief Justice.*—This case raises a question of considerable difficulty and importance as to the existence of a special custom among Labbais or Tamil-speaking converts to Mahomedanism in the District of Coimbatore, or alternatively in the family of the parties to the present suit who belong to that District, to depart from the Mahomedan rule of succession and, as alleged by the defendants, to follow the Hindu Law as regards the Law of property succession and partition. This, however, is too broadly put as the only question arising in the suit is whether they follow the particular rule of Hindu Law which excludes females from the right of succession. The suit is brought by the plaintiffs who are respectively the husband and minor daughter of the deceased Ponnuthayee as her heirs to recover her share under the Mahomedan Law in the estate of her father the late Mahomed Hussain Rowther who predeceased her. In 1877, in a suit tried by Innes, J. in the original side of the High Court, the custom relied by the defendants in the present case was proved to exist, but the case was compromised whilst under appeal; and in *Mirabivi* v. *Vellayanna* [1] which came before the High Court in Second Appeal, this Court reversed the decrees of the Lower Courts' finding a similar custom proved in the Palghat country which adjoins the

* A. No. 106 of 1914. 12th August 1915.

1. (1885) I. L. R. 8 M. 464. 2. (1914) 27 M. L. J. 156.

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Coimbatore District. The decision of course proceeded on the evidence in the case, but the question was approached from the standpoint that it was for the parties setting up the custom to show that though following their religion generally, Lubbais had adopted from the Hindu Law the principle of exclusion of the females. The *onus* no doubt was rightly placed, but, having regard to the fact that we are dealing with the Tamil-speaking people whose adoption of Mahomedanism in many cases due to force cannot be referred to an earlier date than the second half of the eighteenth century, I should prefer to state the question as being whether after their conversion they had adhered in these respects to the usages to which they had been accustomed as Hindus, and with great respect, I am unable in the face of the evidence in this case to attach much weight to the suggestion that the state of things which we find existing may be due to unwillingness on the part of Mahomedan females to assert their rights against the male members of the family. Of the later cases this is the first to come before this Court on first appeal so as to enable the court to appreciate the evidence for itself, but there have been several cases in the Lower Courts in which the custom was upheld when set up, and the plaintiff has had to rely largely on the fact that in certain other cases it was not set up. Exhibits L, C, N, R, H and G show that in suits of 1890, 1892, 1894, 1903 1904, and 1910 arising in the District the women's right to succeed in accordance with Mahomedan Law was not contested. Exhibit G relates to a suit of 1893 in which the custom was pleaded and negatived by the Lower Courts whose judgments were upheld in second appeal as on the other hand Exhibit B and Exhibit B1, relate to a suit of 1901 in which the District Judge held that the evidence went to show that the parties who were Labbais had adhered to the Hindu Law in this respect, but had hesitated to plead such adherence expressly for fear of being considered not to be good Mahomedans, and had set up instead a family custom under which women were excluded from the succession as regards immovable property and were given cash and jewels in lieu of their share. He accordingly upheld the decree of the District Munsif disallowing the custom on the ground that it was not pleaded that the parties had adhered to the rule of Hindu Law and that the family custom derogatory to Mahomedan Law had not been proved. Exhibit 18 relates to a

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suit of 1893 in which it was expressly pleaded on behalf of the minor plaintiff by his mother as his next friend that according to well established custom the widow and daughter of the deceased Labbai do not take any share in the inheritance, and the razinama decree Exhibit 17 proceeded on this view. Exhibit 3 again is a Judgment of the District Judge now Mr. Justice Oldfield in a suit of 1904 which upheld the custom in that case, and Exhibit 16 is a Judgment of a later District Judge in another suit to the same effect. The general result would therefore seem to be that in more recent years, whenever the custom has been set up, it has been established, and the number of instances in which it has not been set up would appear, as was observed by Mr. Brodie in Exhibit B1, to be due to the growing disinclination of members of the community to adhere to a usage which is not in accordance with a strict observance of the *koran* looked at as a whole. The evidence in my opinion goes far to show that the Labbais of this part of India at the date of their conversion preferred to retain the Hindu rule excluding women, as it was not unnatural they should; and I should infer that the usage was general until some time before 1877 when we first hear of the question coming before courts, as any difference on the point must probably before long have given rise to litigation. But it also seems to me perfectly natural that as the evidence shows, there should be of late years a growing tendency to depart from the usage and conform in this matter to the precepts of their sacred law. Now assuming that the special usage among Labbais of this part of the country has been proved, and that it would be open to individual families to abandon it and conform to the ordinary law governing their co-religionists, as to which see the observation of their Lordships in *Raj Kishen Singh* v. *Ramjoy Surma Moozoomdar*,[1] it would be a question of fact whether they had in fact abandoned it, and such abandonment would have to be proved. It is unnecessary to consider this question further because so far as the parties to the suit are concerned, I think that the evidence oral and documentary of their transactions is amply sufficient to show that they adhere to the Hindu rule, even if we put aside the various judgments concerning other persons coming from some part of the country which support this conclusion. Exhibit 10 would seem to show that there had been a partition between

1. (1872) I. L. R. 1 C. 186 (P. C.)

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the plaintiff and his brothers in which the claims of the sisters were ignored, and the document itself is a release by the plaintiff and one of his brothers in favour of another brother of their share in the estate of a deceased brother in which again nothing is allotted to the female members. The first plaintiff who was a party to the deed has not ventured to go into the box which goes very far to prove the custom in the family. Ex. J on which the plaintiffs rely relates to the share which a deceased brother of the defendant's family had in a partnership with two Hindus. It expressly states that the brothers of the deceased were his heirs, though it also states that with them the 1st plaintiff and his brothers as sister's sons of the deceased had received his share. The signatures of the sister's sons who were adults were, I think obtained to protect the surviving partners from any possible claim by them although the document does not include them as among heirs of the deceased, just as there is an indemnity inserted lower down against any claim by the minor daughter of the deceased partner then aged nine. This daughter according to D. W. 8 has since married the 1st plaintiff himself and it is not suggested that any claim has ever been made on her behalf. The general effect of the document is to assert that the brothers of the deceased were his heirs, though for the security of the Hindu partners of the deceased it provides against possible claims against them by his sister's sons and his minor daughter. D. W. 7 who is related to the defendants by marriage proves that in his family their properties were divided by Exhibit 5 without any share being given to the daughters. D. W. 8, who is related to the plaintiff's and defendant's families also speaks to the custom, as does D. W. 10 who is related by marriage to the plaintiffs. D. W. 13, speaks to the fact that women get no shares in the defendant's family and proves Exhibit 10, which as I have already said amply bears him out. I think the evidence oral and documentary is sufficient to show that the defendant's family have adhered with perhaps most of the other Labbais of the neighbourhood to the Hindu rule excluding the succession of females. As observed in *Kunhambi* v. *Kalanthar* [1] it is under the provisions of the Civil Courts Act a question of fact in each case as to the usage followed by the family, and in the present case, I think, the usage is sufficiently proved. As regards the point taken as to *res judicata*

1. (1914) 27 M. L. J. 156.

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Srinivasa Aiyangar, J.

I agree with the judgment of my learned brother and with the order proposed by him.

Srinivasa Aiyangar, J.—The principal question for decision in this case is as to the devolution of the property of a Mahomedan named Hussain Rowther who died, it is said, about the end of the year 1904. He left him surviving 3 sons defendants 1 to 3, a widow, the 4th defendant, and two daughters, Ponnuthayee and Sulaihabi. There was another son who is now dead, but whether he left any heirs other than the parties to the suit does not appear. The two daughters are dead. The first plaintiff is the husband of Ponnuthayee and the second plaintiff is her daughter. Defendants 5 and 6 are the children of the other daughter Sulaihabi.

Plaintiffs sue to recover their share, under the Mahomedan Law, of the share of Ponnuthayee in the estate of her father Muhamad Hussain Rowther. Muhamad Hussain Rowther and the parties to the suit are Labbais. The claim is opposed by defendants 1 to 4, who plead that according to the custom prevailing among Labbai Mahomedans of the Coimbatore District and alternately according to the custom prevailing among the parties and their relations, the property of a deceased Labbai devolves on the sons to the exclusion of the daughters, as under the Hindu Law; they also state that unmarried daughters are maintained out of the paternal estate and Stridhanam given to them at the time of marriage, as in Hindu families. Custom in its legal sense means a rule exceptional to the general rule of law. In countries like England where there is a uniform territorial law binding on all persons, a custom in derogation of that law, when allowed, requires very strict proof. But in India where there are innumerable sects each following its own usages which constitute its law, in many cases it is impossible to say that any particular usage which is pleaded is in derogation of a general law. For instance, the Nambudris and Nairs of the West Coast are Hindus, but they are mostly governed by their usages. In the case of many of the aboriginal tribes who come in under the general designation of Hindus the presumption that they are governed by the Hindu Law of the Smriti writers and their commentators, is so slight that very little evidence suffices to displace this presumption. Among the Nattukottai Chetties of Southern India who are orthodox Hindus, there are usages relating to adoption which are entirely at variance with the rules of the Hindu Law; the Moplahs of

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North Malabar, who are Mahomedan converts from Hinduism, generally follow the Marumakatayam system, modified in some matters by rules of Mahomedan law, as in the case of succession to self-acquired property. The Khojas and Memon Cutchis of Bombay who are Mahomedans by religion follow the Hindu Law of succession. Again a family domiciled in Southern India is presumed to be governed by the Mitakshara School of Hindu Law, but if it is proved that they emigrated from the northern or Maharatta country, this presumption is rebutted, and the family is presumed to retain the Law of the place from which it emigrated. In many cases the enquiry is as to what is the law and not as to what is the usage at variance with law. *Hirabai* v. *Gorbai and another* [1] *Barichan* v. *Berachi* [2] *and Kunhi Raman* v. *Kunhi Parvathi* [3]. The judicial committee in dealing with a family custom forbidding adoption said "looking at the origin and history of the family, it appears to their Lordships that the question is not whether the general Hindu Law is modified by a family custom forbidding adoption, but whether with respect to inheritance, the family is governed by Hindu Law, or by custom which does not allow an adopted son to inherit." *Fanindra Deb Raikat* v. *Rajeswar Das* [4]. The standard of proof which is required in any particular case may therefore vary.

The parties to this suit being Mahomedans by religion they are presumably governed by their religious law (*i. e.,*) the Mahomedan law in matters of succession, there is, however, the fact that the Labbais are a mixed class of Mahomedan consisting partly of compulsory converts to Islam made by the early Mahomedan invaders and Tippu Sultan. (See Madras Census Report of 1891). They generally speak Tamil in their houses. Their marriage ceremony is said to closely resemble that of the low Hindu castes. (See Thurstan on Castes and Tribes, Vol. IV p. 200). It is therefore probable that many of the Labbais being recent converts from Hinduism retained the mode of devolution of property according to Hindu usages even after their conversion, though in course of time they would try to give up such usages and adopt rules of devolution of property prescribed by their religious law. An examination of the evidence in this case presents these features. In 1878 this custom was pleaded in a suit in the original

1. (1874) 12 B. H. C. R. 294 at P. 316, 317. 2. (1892) I. L. R. 15 M. 281.
3. (1910) M. W. N. 642. 4. (1885) L. R. 12 I. A. 72 at 81.

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side of this Court, and Mr. Justice Innes, after a careful consideration of the large mass of evidence, both oral and documentary, placed before him, came to the conclusion that "in the District of Coimbatore there are peculiar customs in regard to marriage and succession, and the most prominent feature in the rule observed as regards succession is that, on the death of a man, leaving sons and unmarried daughters and a widow, the sons take to the exclusion of the females who are simply maintained, and that married daughters are regarded as entitled, as among Hindus, to no provisions whatsoever," Ex. XII. It is noticeable that the evidence in this case consisted mostly of witnesses from the village of Pallipatti in which and in the neighbouring villages the defendants and their relations mostly live. This decision was appealed against, but the appeal was, however, compromised.

This custom was again set up in a case, in *Mirabivi* v. *Vellayan* [1]. That was a case of Lubbai Mahomedans residing at Palghat. Both the first Court and the First Appellate Court held the custom proved. But the High Court interfered in Second Appeal holding that the evidence was not sufficient to prove the custom. The learned Judges were able to find satisfactory explanation in the evidence in that case as regards the various instances proved in that case of devolution in accordance with the principles of Hindu Law.

The next occasion when the matter was the subject of controversy was in the year 1901. (Ex. B. and B1)—Exhibit B is the judgment of Mr. Sadasiva Aiyar (now Mr. Justice Sadasiva Aiyar) as District Munsif of Coimbatore and B1 is the judgment of Mr. Brodie, the District Judge on appeal. A careful perusal of the two judgments leads to only one conclusion, namely that at that time, that is so late as 1901, it was the practice, of the Labbai Mahomedans of Coimbatore District to follow Hindu usages in matters of succession. In para 6 of the appeal judgment Ex. B, Mr. Brodie observes that "though no doubt the customary law of the Lubbais in this District has up-to-date been more in accordance with Hindu than Mahomedan Law *as is only natural*, I observe a tendency on the part of the defendants in such cases as the present to resort to any defence to defeat such claims amongst themselves rather than plead that they are governed in anything by Hindu Law as this lays them open to

1. (1885) I. L. R. 8 M. 464.

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the reproach of not being strict observers of Mahomedan practices". The actual decision was in favour of the claim of a female to a share, but this was based on the absence of the plea that the parties were governed by Hindu Law in matters of succession.

Again in 1906 the District Judge of Coimbatore held the custom proved in Exhibit III.

This matter came up for adjudication again in 1910 and it was held that among the Lubbais of Pallapatti the custom of exclusion of females was prevalent, Exhibits IX and XVI.

There is only one other judgment to which I need make reference, *i.e.*, Exhibit G. What is printed in the records is merely the decree in the Second Appeal, but our attention was drawn to the judgments in the Lower Courts. It appears that in a previous litigation between the parties this custom was set up, but was found against for want of evidence. In the present litigation the question was disposed of on the plea of *res judicata*; this decision is not of use either way. The respondent relied on several judgments in partition suits in which the right of females to shares was not disputed. They are Exhibits L and M in 1890, Exhibit C in 1892, Exhibit IV in 1894, Exhibit R in 1903, Exhibit H in 1904 and Exhibit Q in 1910. In Exhibit XVIII a plaint in a suit of 1893 the custom was expressly pleaded by a mother suing as next friend of her minor son; the suit was compromised but the compromise-decree, Exhibit XVII proceeded on this view. The documents referred to above prove in my opinion the general prevalence among the Lubbais of the Coimbatore District of this custom of excluding females from participating in the property of their deceased ancestors at the time of partition, and also that in recent times the custom was not set up in some cases owing to the disinclination of members of this community to follow usages at variance with their religious law.

There is evidence in the case which establishes that the family of the parties follow this custom. Defence 7th witness, a relation of the parties follows this custom and proves a partition in his own family, where the father's properties were divided amongst the sons without any share being given to the daughters, Exhibit V. The property divided was considerable. He says, no doubt, in his examination-in-chief, that he does not remember what the brothers did for the daughters, but that does not imply

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that anything was given to the daughters on account of their shares. The statement may refer to the practice of giving Stridhanam. Defence 8th witness, another relation speaks to a partition in his own family in which the daughters were not given any shares. Defence 10th witness also a relation proves Exhibit VIII, a deed of partition which shows that the sons alone divided the properties of their father. The mother who was alive was not given a share, but Rs. 200 was set apart for her maintenance as in the case of a division among the members of a Hindu family. I attach considerable importance to this circumstance. Defence 13th witness speaks to this custom and proves Exhibit X. It is a release executed to the 1st plaintiff by two of his brothers releasing all their rights to the property of a deceased brother, the executants receiving Rs. 900 from the 1st plaintiff in satisfaction of their claims. The 1st plaintiff and his two brothers considered themselves solely entitled to the property of their deceased brother, though their sisters were alive at the time. The document also recites an oral partition among the brothers which again makes no reference whatsoever to the sisters. This document is important as proving an instance of exclusion of females in the plaintiff's own family. The 1st plaintiff has not chosen to go into the box to explain this transaction; general evidence is given by the other witnesses for the defendant in proof of the custom, but I do not attach much value to that evidence. There is no evidence on the plaintiff's side except general statements of witnesses to which again I am unable to attach any weight. The learned pleader for the respondent relied on Exhibit J as affording an instance in which the Mahomedan Law was assumed by the family to be the law by which they were governed. After carefully considering this document I am unable to come to any such conclusion; on the other hand, I agree with my Lord the Chief Justice that it is against the plaintiff. The evidence above set out, taken along with evidence of the general prevalence of the practice, is, I think, sufficient to prove the family custom set up.

It is remarkable that the 4th defendant the widow, who, if the Mahomedan Law applied, would be entitled to a ⅛th share in the properties of her husband which are of considerable value, disputes the claims of the plaintiffs along with her sons defendants 1 to 3. No explanation is given for her disclaiming any interest in the valuable properties of her husband nor is there

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any reason shown for her joining her sons as against her own daughter's children. I am therefore unable to agree with the conclusion of the Lower Court on this point. On this ground the decree of the Lower Court will have to be reversed and the plaintiff's suit dismissed with costs throughout.

The appellants contended that the plaintiffs are not entitled to institute this suit as they had already instituted O. S. No. 16 of 1909 in respect of the same cause of action. I agree with the Lower Court that the cause of action pleaded in O. S. 16 of 1909 was quite different from the cause of action in the present suit and disallow this contention.

The appellants also contended that this suit is barred by limitation in respect of the movables. It is unnecessary to decide this question as we are dismissing the plaintiffs' suit on another ground.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Spencer and Mr. Justice Seshagiri Aiyar.

Nanu Nair and others ... *Appellants* (Defendants Nos. 1, 2, 4, 5, 6, 8, 9, 10, 12 to 16, 18, 20 to 34, 36, 37, 39 and 40.)*

v.

Kantan Ashta Moorthi Nambudripad and others. *Respondents. (Plaintiffs' L. R. Defendants. 7, 41 to 46, L. Rs. of 46, 47, 48, 49, L. R. of 50, and 51 to 54 defendants).*

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Malabar Law—Kanom—Suit for redemption—Burden of Proof—Title admitted —Evidence Act S. 90—Presumption applicable to copies—Practice—Civil Procedure Code, S. 105 Cl. (2)—Remand set aside—Appeal from revised judgment—Findings given previously, open to question in appeal—Interest Act—Kanom in writing—Time not specified—Interest not awardable.

Where the title of the plaintiffs is admitted and the defendants are shown to have come into possession as mortgagees, Courts will not demand such strict proof of the mortgage sued on as where title is denied and possession is not shown to have been under the plaintiffs.

The presumption as to ancient documents contained in S. 90 applies to copies as well as originals.

The custom of jenmis in Malabar of keeping marupats or copies of Kanom documents, referred to.

Where a Kanom document provided for the payment of so much per year without specifying the date on which the payment was to be made: *Held* that in the absence of a demand, no interest was claimable on the arrears.

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* S. A. No. 1042 of 1913. 9th February 1915.

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v.
Ashta
Moorthi
Nambudri-
pad.

Where in a suit for the recovery of possession on foot of a demise, the Lower Appellate Court differing from the Court of the 1st Instance found that the demise sued on was genuine and remanded the suit but the order of remand was set aside by the High Court on the ground that the disposal not being on a preliminary point, the remand was unauthorised.

Held, that on the appeal from the revised judgment of the Lower Appellate Court, it was competent to the defendant to question the finding as to the genuineness of the demise sued on.

Second appeal from the decree of the Court of the Subordinate Judge of Coimbatore in revised appeal suit No. 649 of 1909 preferred against the decree of the Court of the District Munsif of Palghat in O. S. No. 322 of 1907.

C. V. Anantakrishna Aiyar for Appellants.

A. Nilakanta Aiyar for Respondents.

The Court delivered the following

Judgment:—The plaintiff's case is that the properties in suit belong to his Mana in jenm, that they were demised by two kanom deeds in the year 1840 in favour of two ladies who were members of the defendants' tarwad, and that the defendants have denied his jenm title. He sues to recover possession and michavaram on payment of the kanom amount. The defendants pleaded that the properties did not belong to his plaintiff's Mana and alleged that they were their tarwad properties. They also denied the demises sued on.

The District Munsif held that the demises were not proved and dismissed the suit. On appeal, the Subordinate Judge came to the conclusion that "the demises sued upon were true and that the plaint lands were held under them." He reversed the decree of the District Munsif and remanded the suit. An appeal was preferred to the High Court against this order of remand. The learned Judges who heard it pointed out that as the District Munsif did not dispose of the suit on a preliminary point, the order of remand was wrong. They set aside that order and directed the Sub-Judge to re-hear the appeal after calling for findings on the other issues raised in the case.

Findings were submitted, and on their receipt the Subordinate Judge held that the properties belonged in jenm to the plaintiff's Mana and decreed possession. He also passed a decree for the payment of the poruppu and for the value of improvements. This second appeal is against that decree.

Mr. Ananthakrishna Aiyar stated frankly at the outset that he was not prepared to contest the finding that the properties

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originally belong to the plaintiffs' Mana. He contended that there is no legal evidence to support the demises sued on.

Before dealing with the points argued by the learned vakil, it is necessary to dispose of a preliminary objection raised by Mr. Nilakanta Aiyar on behalf of the respondents that it is not competent to the appellant to object to the finding that the demises were legally proved. His contention is that as the Subordinate Judge in his order of remand found distinctly in favour of the demises, and as that finding was not reversed by the High Court in the appeal against his order, the question should not be reopened. This argument proceeds on a misconception of the provision, of S. 105; Cl. (2) prevents a party from agitating in the appeal against the decree a question which he could have objected to in the appeal against the order. The test is not whether a decision has been given upon the points raised in the Civil Miscellaneous Appeal, but whether the party availed himself of the appropriate remedy of appealing against the order. In the present case, there was an appeal against the order of remand and that order was reversed. It is difficult to see how the appellant could have compelled the Court to express an opinion on a subsidiary point, when the order itself was vacated. The right view is to hold that the decision on the question of the demises was not given in the order which has been set aside, but in the final judgment which superseded it. The preliminary objection must be overruled.

The main point for consideration is whether there is legal evidence on which the Sub-Judge could have based his decision in favour of the demises sued on. Mr. Ananthakrishna Aiyar contended that Exhibit A has not been properly proved, and that there is no other evidence oral or documentary which would justify the finding of the Lower Appellate Court. Before dealing with Exhibit A, it is desirable to consider whether there is other evidence on which the conclusion of the Sub-Judge can be upheld. Exhibit E is an account of the property given as security by one Sankaran Nair who admittedly was a member of the defendants' tarwad. In the bond he executed, "property sowing 80 paras of paddy and situated in Netumbalam" is described as the jenm of the Kuruvayur Mana. Sankaran Nair is described as the kanomdar. It is not alleged that the plaintiffs' Mana had any other property in Netumbalam. The amount of the kanom is also given. The note appended to

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the document shows that the kanom document was produced before the Head Gumastha of the Taluk Office. Then we have C and D which are extracts from the Stamp Register book showing that two stamp papers for writing kanom deeds relating to lands sowing 40 paras of paddy each were purchased in Meenam 1015 (corresponding to 1840). They were sold to Kuruvayur Manakkal Nambudripad, the predecessor in title of the plaintiff. The District Munsif who decided the point against the plaintiff did not impugn the genuineness of these documents. The description in these documents of the ladies to whom the demises were executed as belonging to *Thottanchath* led him to hold that the defendants' tarwad was not the demisee. The Subordinate Judge on a careful examination of the evidence has come to the conclusion that the tarwad was known by the names of Kuruvakat and Thottanchath indiscriminately. In this view, he is justified in holding that the reference in Exhibits C, D and E was to the defendants' tarwad. There is also Exhibit G the evidence of the plaintiffs' witnesses taken on commission to support the plaintiffs' case. We cannot say that the Subordinate Judge was not entitled to draw the inference that the property belonged in jenm to the plaintiffs' Mana and that the defendants' tarwad held them as kanomdars. Where the property is conceded to have belonged originally to certain persons and others have been recorded as holding under them, very little evidence regarding the actual letting relied upon will suffice. The decision of the Bombay High Court in *Bala* v. *Shiva* [1] applies to such classes of cases. The burden of proof is shifted to the defendants to establish their title. Mr. Anantakrishna Aiyar relies upon *Krishna Pillai* v. *Rangasami Pillai* [2], *Vasudevan Nambudri* v. *Krishna Pisharoti* [3], and *Koman Nair* v. *Kesvan Nambudri* [4] to show that where a particular mortgage is sued upon, Courts should not give relief on a mortgage not pleaded in the case. These decisions do not affect the present case. Where the title of the plaintiff is admitted and the defendants are shown to have come into possession as mortgagees under the plaintiff, Courts will not demand such strict proof of the mortgage sued on, as where title is denied and possession is not shown to have been under the owners. The facts appearing in evidence in this case are enough in the circumstances already mentioned to prove the demises sued on.

1. (1902) I. L. R. 27 B 271.
2. (1895) I. L. R., 18 M. 462.
3. (1903) 13 M. L. J. 274.
4. (1906) 17 M. L. J. 122.

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There is another ground upon which the decision of the Subordinate Judge can be supported. The kanom deeds relied upon have not been produced. If the plaintiffs' claim is true, the deeds must be in the possession of the defendants. They deny the kanom. The plaintiff produces Exhibit A which he alleges is a maruput or copy of one of the kanom documents. It is not signed; nor has there been any proof of its execution. It purports to be more than 30 years old. The Subordinate Judge held it to be genuine. He says that it is customary in Malabar for jenmies "to keep maruputs or copies of kanom documents." Mr. Wigram in his book on Malabar law refers to this practice In *Parameswaran Nambudripad* v. *Ammunni Nair* [1], a marupattam is said to be "a copy of the document executed to another to be retained by the party executing it". Exhibit A corresponds to this description. It comes from proper custody. It is argued that the presumption as to ancient documents contained in S. 90 of the Evidence Act does not apply to copies. In *Appathura Pattar* v. *Gopala Panikkar* [2], it was stated that the presumption suggested in S. 90 and in S. 114 illustration (*g*) does not apply to copies of documents. But in *Haji* v. *Sankaran Nair* [3], the learned judges were not prepared to follow the earlier ruling. It seems to us that it would be unduly narrowing the scope of S. 90 to hold that copies of the documents are not within the rule. In the language of illustration (*g*) to S. 114, a presumption arises against the defendants by the non-production of the original. See *Rajah Kishen Dutt Ram Panday* v. *Narendar Bahadur Singh* [4], and *Ram Prasad* v. *Raghunandan Prasad* [5]. Under the Evidence Act, where the original is not produced, a copy made from the original can be exhibited to prove the transaction. S. 90 which follows the sections relating to proof by secondary evidence refers to presumption regarding "any document." There is nothing in its language to restrict its operation to original documents only. The rule of law is thus stated in Wigmore on Evidence Vol. III S. 2143, (Sub-section 2). "Where the alleged ancient original is lost, and an ancient purporting copy is offered, made by a private hand, and the purporting maker being unknown or deceased, it seems to have been long accepted that this suffices, and that the

1. (1899) 9 M. L. J. 300.
2. (1902) I. L. R. 25 M. 674.
3. (1907) 21 M. L. J. 981.
4. (1878) L. R. 3 I. A. 85.
5. (1885) I. L. R. 7 A. 738.

copy may be received under the ancient-document rule." The authori y of Lord Eldon and of Chief Baron Gilbert is quoted in support of this proposition. In *Ishri Prasad Singh* v. *Lalli Jas Kunwar* [1], the principle of S. 90 was applied to certified copies. We think that the object of the section will be frustrated, if the presumption is not extended to copies. Of course, Courts must scrutinise such copies very carefully and should not apply the presumption until the conditions required by the section are strictly conformed to. We do not think that when all the tests are satisfied, the fact that the document affected is a copy and not the original should make any difference. We are, therefore, of opinion that the Subordinate Judge was right in acting on Exhibit A. In this view, his finding on the question of title and on the demises sued on must be upheld.

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There are a few subsidiary points to be noticed. Exhibit A relates to 40 paras sowing land. It fixes the puroppad payable to the landlord at 5 paras. It was argued that as there is no evidence in regard to the puroppad on the other half of the suit properties, plaintiff is not entitled to any puroppad in respect of it. In the view that we have taken that Exhibit A is a copy of one of the two documents of the same date, there is no reason for not holding that the same terms were embodied in the other kanom deed as well. We see no reason for differing from the Subordinate Judge in this respect. We also agree with him that the defendants are entitled to get only the money value of the gold coins as on the date of payment. Exhibit E refers to the commutation value in rupees, and that indicates that the parties never contemplated the return of the coins or the payment of their value at the time of the redemption. The Sub-Judge is also right in holding that the defendants are only entitled to get a sum of money which would secure to them in perpetuity 20 paras of paddy. The contention that the amount must be such as would enable the defendants to purchase a jenm right is extravagant. The Sub-Judge has rightly held that the defendants were bound to pay the enhanced Government revenue. After some conflict of views, it was decided in *Kunchu Menon* v. *Narayanan Ezhutessan* [2] that the mortgagee in possession was chargeable with such payments. We think this decision is right.

The Subordinate Judge has decreed interest at the rate of 12

1. (1900) I. L. R. 22 A. 294. 2. (1903) 16 M. L. J. 317.

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per cent. upon the arrears of rent due to the plaintiff. The claim is a stale one and we do not think he was justified in decreeing more than 6 per cent. See *Parasurama Pattar* v. *Venkatachellam Pattar* [1]. But we think that no interest is payable in this case. The Judicial Committee of the Privy Council pointed out in *Ganesh Baksh* v. *Harihar Baksh* [2] that where the conditions of Act XXXII of 1839 are not to be found, interest by way of damages is not awardable under the Contract Act. It is on this principle, it was held in *Kamalammal* v. *Peeru Meera Levvai Rowther* [3] that where there has been an oral lease, no interest is payable on the arrears claimed. Our attention was drawn to an unreported judgment of this Court in appeal No. 187 of 1899 which seems to suggest that if the contract is in writing, interest may be decreed. We are unable to follow this decision. Their Lordships of the Judicial Committee lay stress upon the clause in the Act which says that the claim must be made "by virtue of some written instrument payable at a certain time." Sir Francis Maclean and Banerjee, JJ. construe this clause to mean that the date of payment must be definite. See *Surja Narain Mukhodaphaya* v. *Pratap Narain Mukhopadhaya* [4]. Exhibit A contains no stipulation for payment of the rent at any fixed time. It only provides that the various payments "should be given per year". There is no evidence in this case that such payments were made or claimed at any particular period of the year. The object of the Act is to penalise the person who withholds payment when the same is due. That is the reason why provision is made for interest running after demand. In the present case, there is no period fixed for payment. There has been no demand; and there is no stipulation for interest in the copy produced. Under these circumstances, we must disallow the interest decreed by the Subordinate Judge. Subject to this modification, the second appeal is dismissed. Parties will give and receive proportionate costs throughout. Six months' time from this date for payment.

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1. (1914) M. W. N. 198.
2. (1904) I. L. R. 26 A. 299.
3. (1897) I. L. R. 20 M. 481.
4. (1899) I. L. R. 26 C. 955.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Ayling and Mr. Justice Tyabji.

Sankaravelu Pillai, minor by his adoptive mother and next friend Karuppayee Ammal. *Appellant* * *(Plaintiff)*

v

Muthusawmi Pillai ... *Respondent (Defendant).*

Sankaravelu Pillay v. Muthusawmy Pillay.

Hindu Law— Widow — Compromise— Construction—" Absolute rights for food and clothing "—Nature of property taken —Registration Act S. 17. 49 —Decree —Incorporation of terms of compromise though not in operative part of decree.

Where, in a suit brought by the plaintiff's adoptive father to declare a certain alienation purporting to be on behalf of his minor daughter-in-law was invalid, a compromise was arrived at by which the defendant, his daughter-in-law who had claimed half under an award was given a ¼th of the properties "with absolute rights" towards her food and clothing charges and the plaintiff's father the remainder and neither was to have any right nor interest in the property allotted to the other.

Held, that upon a proper construction of the compromise, the daughter-in-law took an absolute estate in the properties allotted to her.

Held also that the compromise did not require registration, the court having sanctioned the compromise on behalf of the minor defendant (daughter-in-law) and practically incorporated the terms of the compromise in the decree though the operative part of the decree only purported to dismiss the suit.

Second appeal against the decree of the Court of the Temporary Subordinate Judge of Ramnad at Madura in A. S. No. 513 of 1913, preferred against the decree of the Court of the District Munsif of Satur in O. S. No. 269 of 1912.

Plaintiff as the adopted son of one Kuppayandia Pillai sought to recover plaint property as having been set apart for the maintenance of Meenakshi (wife of his predeceased son) and as having been alienated by her to defendant The defendant contended that the plaint property had been given to Meenakshi absolutely as per terms of the compromise in O. S.429 of 1904 between K and M and that he had purchased the same. The District Munsif found that the rajinamah was inadmissible in evidence and that Meenakshi had obtained plaint property merely for being enjoyed by her during her lifetime and gave a decree for plaintiff. On appeal the Subordinate Judge held that the rajinamah was inadmissible and that Meenakshi got an absolute estate for the property comprised under it and dismissed the plaintiff's suit. Plaintiff appeals.

The material portion of the document Ex. II is given below.

* S. A. No. 1546 of 1914. 21st September 1915.

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"We have effected a compromise between us in the following terms :—

The plaintiff (Kuppayandia Pillai) shall enjoy with all absolute rights ¾ of the properties specified in the plaint schedule as well as in the schedule hereof, together with ¾ part of the right to the water of the ⅓rd share of the well. The 1st defendant (Meenakshi) has no right, interest or claim of any sort in respect of the same. The remaining ¼ share of the properties as well as ¼ share of the right to the water of the ⅓ share of the well shall be enjoyed with all absolute rights by the 1st defendant towards her food and clothing charges. And the plaintiff has no right, interest or claim whatever thereto * * *

The 1st defendant has no right, interest or claim in respect of either the movable properties in the possession of the plaintiff or in the properties which have been sold by the plaintiff to Udayar Thevan or in the other immovable properties belonging to plaintiff, such as house, etc. * * *

Of the alienations made by the plaintiff in respect of the schedule properties, those which relate to the ¼th share of the properties left in favour of the 1st defendant should be satisfied and redeemed for her by plaintiff * * *

Until the said encumbrance are thus discharged severally by them, they should not subject their share of the properties to any further encumbrances. If they do so, they shall be answerable to each other and liable to be proceeded against in civil or criminal courts for their breach of trust."

K. V. Krishnasawmi Aiyar for Appellant.

T. M. Krishnswami Aiyar for *A. Krishnasawmi Aiyar* for Respondent.

The Court delivered the following

Tyabji, J

Judgments :—*Tyabji, J.* :—Two main questions arise for decision in this appeal in which the rights of the parties under Ex. II have to be determined.

The first question is whether Ex. II required registration, or whether it can be adduced in evidence and can affect immovable property notwithstanding that it has not been registered. This question depends primarily upon the effect of Ss. 17 and 49 of the Indian Registration Act. Section 17 provides in the first instance that the documents mentioned thereinafter shall be registered, if the property to which they relate is situated

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in certain districts. Then certain classes of documents are mentioned which are all such as operate to create, declare, assign, limit or extinguish any right, title or interest in immovable property, and include gifts and leases. The second sub-section of S. 17 excepts twelve kinds of documents which need not be registered, though it might otherwise have been considered that clauses (*b*) and (*c*) of sub-section (1) covered them in other words that they are documents of the classes mentioned above. Amongst the excepted class of documents is mentioned, "any decree or order of a court or any award."

S. 49 provides *inter alia* that no document required by S. 17 to be registered shall affect any immovable property comprised therein unless it has been registered.

The first argument of the appellant is that Ex. II a non-testamentary instrument purporting to create an interest in real property and ought therefore to be registered under S. 17, unless it is a decree or order of the Court, and that it is not a decree or order.

On this question, there are two short dicta of the Privy Council to which it is necessary to refer. The first of them occurs in *Bindesri Naik* v. *Ganga Saran Sahu* [1]. Their Lordships there stated that "they were satisfied that the provisions of S. 17 of the Act did not apply to proper judicial proceedings, whether consisting of pleadings filed by the parties, or of orders made by the Court." Then in *Pranal Anni* v. *Lakshmi Anni* [2] they state "the razinamah was not registered in accordance with the Act of 1877; but the objection founded upon its non-registration, does not, in their Lordships' opinion apply to its stipulations and provisions in so far as these were incorporated with, and given effect to by, the order made upon it by the Subordinate Judge in the suit of 1885. The razinamah, in so far as it was submitted to, and was acted upon judicially by the learned Judge, was in itself a step of judicial procedure not requiring registration; and any order, pronounced in terms of it constituted *res judicata*, binding upon both the parties to this appeal, who gave their consent to it." It seems to me that when these two passages in their Lordships' Judgments are read together—and it is significant that Lord Watson delivered the opinion of the Privy Council in each case—the principle upon which their Lordships proceeded appears

1. (1897) I. L. R, 20 A. 171. 2. (1899) I.L.R. 22 M. 508 s. c. 9 M.L.J. 147.

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to be that, inasmuch as under the law as regards registration read together with the law relating to *res judicata* orders and decrees of the Court do not require to be registered, all such other judicial proceedings also as are necessary to be referred to in order to determine what it is that has become *res judicata*—all such other judicial proceedings also are excepted from the provisions of the Indian Registration Act: unless this were the case the law relating to *res judicata* would be subject to the proceedings of the court being registered, which it is clear could not have been the intention of the legislature. There are two decisions of this court bearing upon the point under consideration apparently conflicting with each other, *Natesa Chetti* v. *Vengu Nachiar* [1] and *Chelamanna* v. *Rama Rao* [2]. It seems to me that it is unnecessary for us in the present case to determine the question on which the conflict of opinion arises. For taking the view of the Privy Council to be as I understand it, in the present case, it seems to me that the compromise between the parties must be taken to have been incorporated in the decree of the Court, Ex. V, which refers in terms to the compromise. Ex. II, purports to sanction it on behalf of the minor. It is true that the ultimate, operative part of the decree purports to be merely that the suit shall be dismissed, yet read as a whole it seems to me to be clear that the decree incorporates the terms of the compromise. I feel therefore no hesitation in arriving at the conclusion that the Lower Appellate Court was right in the conclusion at which it arrived that Ex. II can be adduced in evidence and can be read as part of the decree Ex. V so as to affect the immovable property comprised therein notwithstanding that it has not been registered.

I come to the second point which was argued before us, namely, that on the true construction of Ex. II the 1st defendant therein referred to, acquired only a limited or a widow's estate in the property mentioned. We had recently to consider in S. A. No. 2859 of 1913 the effect of the decisions of the Privy Council and of the courts of India which lay down that the ordinary intention of a Hindu in making a transfer of property to a Hindu woman ought to be taken into consideration when the deed of transfer is to be construed, and that the presumption in the absence of something clear to show the contrary is that only a limited estate is granted; the presumption may be rebutted by words showing that unrestricted power to alienate was given or

1. (1909) I. L. R. 33 M. 102. 2. (1911) I. L. R. 36 M. 46.

that the estate was to be heritable by the heirs of the woman and not to revert to the heirs of the grantor of the interest. I pointed out in that appeal that this rule must be taken to be an exception to the general law laid down in S. 8 of the Transfer of Property Act and S. 82 of the Indian Succession Act, and though I was myself inclined in that case to take the view that the full rights were given to the donee under the instrument, I felt pressed by the fact that both the lower Courts had decided to the contrary effect and that my learned brother agreed with the view taken by them.

In the result I thought that it was not a case in which it was incumbent upon me to give effect to my own inclination. I therefore agreed to the dismissal of that appeal.

In the present case the circumstances seem to me to be materially different. We have the fact, first of all, that Ex. II was a compromise in the course of a litigation brought about, as is clear from the facts mentioned to us by the widow for the express purpose of asserting an absolute right to the property which was the subject matter of O. S. No. 429 of 1904. Secondly the plaintiff, it is stated in Ex. II, has no right, interest or claim whatever in the property alloted to the widow; on the other hand there is, no doubt, a reference to the fact that the absolute rights given under Ex. II to the widow are "towards her food and clothing charges." Thirdly the property that is given to the widow is only a fourth of what she claimed and it is a part of the appellant's case that this one-fourth would be far in excess of what she would have been entitled to get if it were intended merely to take the place of her maintenance. On these facts it seems to me that it is S. 8 of the Transfer of Property Act rather than the presumption of what a Hindu would ordinarily do when he purports to transfer of his own free will property to a Hindu woman, that should govern the construction of this document. It seems to me that there is nothing to show that the dominant factor was the desire or the intention of the transferor to give only such an interest in the property as he would of his own free will like to give. The parties were at arm's length. A claim was put forward to the absolute title to the whole of the property and that claim was compromised by giving to the claimant one-fourth of the property. It seems to me therefore that there is no room for the presumption being

Sankaravelu Pillay v. Muthusawmy Pillay.

drawn that that one-fourth of the property must have been given on the terms on which it would have been given had it been a free gift. It seems to me that as a consequence Ex. II must be given effect to as an absolute transfer of the property in accordance with the decision under appeal.

I would therefore dismiss the appeal with costs.

Ayling, J.

Ayling, J. :—I entirely concur with my learned brother in holding that the razinamah, Exhibit II, does not require registration to render it admissible in evidence or operative as a transfer of the suit property to Minakshi.

As regards its correct interpretation, I am not free from doubt; but as my learned brother is clearly of opinion that the construction adopted by the Lower Appellate Court is correct, I am not prepared to differ from him on this point.

The second appeal is dismissed with costs.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Ayling and Mr. Justice Tyabji.

Keepilacheri Parkum Cheepothi Ammad and others. *Appellants* * (*Plaintiffs*)

v.

Vannathankandiyil Ambalathan Kandi Ayissa, minor by guardian the 2nd Respondent, *Respondents* (*Defendants 1, 2, 4, and 3rd Defendants L. R.*)

Practice—Appellate Side Rules of Practice, Rule 105—Dismissal for not printing not ultra vires.

Parkum Cheepothi Ammad v. Ambalathan Kandi Ayissa.

Rule 105 of the Appellate Side Rules of Practice providing that an appeal shall be liable to be dismissed if papers are not printed is not *ultra vires* of the High Court.

Second Appeal against the decree of the Court of the Temporary Subordinate Judge of Tellicherry in A. S. No. 666 of 1911, preferred against the decree of the Court of the District Munsif of Nadapuram in O. S. No. 593 of 1910.

B. Narasimha Rao and *T. K. Govinda Aiyar* for Appellants.

T. R. Ramachandra Aiyar for Respondents.

The Court delivered the following

Judgment:—*Ayling, J.*—This Second Appeal comes before us for orders with reference to Rule 105 of the Appellate Side Rules. The appellants admittedly failed to make the necessary deposit for printing papers as required by the rules within the time allowed; and in our order on C. M. P. No. 2329 of 1915 we have declined

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* S. A. No. 1009 of 1914. 24th September 1915.

to extend the time. Under the rule, the appeal is therefore liable to be dismissed.

It has however been argued that the latter part of the rule itself (Rule 105) is *ultra vires*. The rule runs thus:

"The Appeal shall be liable to be dismissed for default of prosecution if any of the papers mentioned in this rule have not been printed owing to the appellant's failure to make the necessary deposit therefor."

The rule as it stands has been in force since 1905 and has frequently been enforced by dismissal of appeals: Even in 1905 it was in no sense a novel provision. A similar penal clause is found in the rules as far back as 1879, though it is omitted or modified in the rules as reissued between 1900 and 1905. No authority whatever has been quoted in support of the contention that it is *ultra vires*, and so far as I am aware its validity has never hitherto been questioned.

It is in my opinion undoubtedly covered by Section 37 of the Letters Patent which gives this court power "to make rules and orders for the purpose of regulating all proceedings in Civil cases which may be brought before the said High Court."

Our attention was drawn to the proviso which enacts that in making such rules and orders the High Court shall be guided as far as possible by the provisions of the Code by limiting the right of appeal conferred by S. 100 of the Code of Civil Procedure and I do not think there is much force in the contention that it is at variance with the provisions of O. 41, (reproducing S. 541 *et seq* of the old code) as to the manner of disposal of an appeal. There seems to be no reason why an order of dismissal for infringement of this rule should not be covered by either R. 11 (1) or R. 16 of O. 41 of the Civil Procedure Code. Which of these would be applicable would depend on the procedure followed by the Appellate Court prior to the time of default. In the present case notice has issued under Rules 13 and 14, respondents have been served, and appearance has been filed for two of them (Respondents 3 and 4). The appeal has not been posted under Rule 12 for disposal on its merits, appellant having made default in payment of printing charges while respondent was being served with notice. Rule 16 would therefore appear to be applicable. But under either rule the dismissal would appear to be legal. Each gives appellant a right to be heard "in

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support of the appeal"; but where the appeal is liable to be dismissed on a preliminary ground, he cannot demand a hearing on the merits of the appeal.

The penal proviso in the rule under consideration appears to be substantially identical with that embodied in the Rules of the Calcutta High Court, Part II Chapter VIII Rule 17 and Chapter IX Rule 5. The former clause (Rule 17) was the subject of consideration in two cases (*Ram-Hari Sahu* v. *Madan Mohan Mitter* [1] and *Fatimunnissa* v. *Deoki Pershad* [2]. The immediate question was the nature of the remedy available to an appellant, whose appeal had been dismissed for default: but it is to be observed that throughout the argument in each case no doubt appears to have been felt as to the validity of the rule.

In my opinion Rule 105 is not *ultra vires.* I would direct the dismissal of the appeal with costs.

Tyabji, J.:—I agree.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Spencer and Mr. Justice Coutts Trotter.

S. M. Venkatarama Aiyar ... *Appellant* * *(Plaintiff)*

v.

Rajagopala Iyer (dead) and others ... *Respondents (Defendants 1 to 5 and L. Rs. of the deceased 2nd and 1st Respondents).*

Venkatarama Aiyar v. Rajagopala Iyer.

Pleadings—Dismissal of a suit on, not warranted except in very clear cases.

The practice of dismissing a suit on the pleadings alone, is highly to be deprecated, and ought not to resorted to except in absolutely clear cases.

Second appeal against the decree and judgment dated 7th day of October 1912 of the District Court of Tanjore in A. S. No. 39 of 1910 preferred against the decree of the Court of the Subordinate Judge of Kumbakonum in O. S. No. 68 of 1909.

The plaintiff sued his 5 brothers for contribution for Rs. 4,000 under the following circumstances as set out in his plaint:—The plaintiff became divided from his 5 brothers in 1904 under an oral arrangement of partition by which all the family properties were divided into six shares, plaintiff taking certain specific properties as for his one-sixth share, and each of the six

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* S. A. 400 of 1913. 16th September 1915.

1. (1895) I. L. R. 23 C. 339. 2. (1896) I. L. R. 24 C. 350. (F. B.)

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brothers agreeing to discharge $\frac{1}{6}$th of the debts due by the family (simple and mortgage debts) without allocating any particular debt to any of the brothers as the property allotted to one or two brothers had each to bear more than a sixth share of the family debts. Plaintiff further alleged that it was also then agreed that if any one of the brothers paid or had to pay more than a sixth share of the debts he should be recouped the same by the other brothers. Plaintiff alleged that he was allotted at the partition certain lands which were burdened with a mortgage for Rs. 11,000, that after his paying his one-sixth *viz.*, Rs. 5,000, to other creditors of the family he paid Rs. 4,000 to the mortgagee of the lands that fell to his share, that he was, therefore, entitled to be reimbursed that amount of Rs. 4,000, by his brothers. The plea of the defendants was (*a*) that there was no such oral arrangement of partition, (*b*) that plaintiff was first bound to pay only the mortgage debt due on the lands allotted to him, (*c*) that whatever he paid to others before paying the mortgage amount was voluntary, (*d*) that the suit was virtually to recover the amount paid voluntarily and (*e*) that the recovery of the amount paid to others was barred by limitation as having been paid more than three years before suit.

Without taking any evidence in the case as to the correctness or otherwise of the contentions on each side and without giving any decision on plea (*a*) stated above, both the Lower Courts upheld the pleas (*b*) (*c*) (*d*) and (*c*) and dismissed the suit as disclosing no cause of action. The Appellate Court further stated in its judgment that the suit was based upon a *written* arrangement of partition. Plaintiff preferred this second appeal.

N. Rajagopalachariar for Appellant.

T. R. Ramachandra Aiyar for Respondents.

The Court delivered the following

Judgment:—The learned District Judge professed to decide this case after consideration of the terms of the partition deed. No such deed is even alleged ever to have existed. The plaint discloses a possible cause of action under either S. 69 or S. 43 of the Contract Act. The practice of non-suiting plaintiffs in other than absolutely plain cases is to be deprecated. The art of pleading in this country has not reached the point at which it is safe to assume that the pleader gives the exact effect of the contract pleaded and where the line of distinction between the actionable and the non-actionable was a fine one, as in this case, the only

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proper course was to hear the evidence and examine the documents. This is doubly important, where the pleading is applying the vernacular to complex legal conceptions and relations. It is most regrettable that the Subordinate Judge should have suggested that the plaintiff was officious in depriving the defendants of an opportunity of evading the payment of their legal and just debts.

The judgments below must be set aside, and the case sent back for *trial-de-novo.*

Costs in all 3 courts will abide the result of the new trial.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Spencer and Mr. Justice Phillips.

Kalianji Singji Bhai, sole partner of the firm of Raysee Amerchand — *Appellant * (Counter-Petitioner).*

v.

The Bank of Madras. — *Respondent (Petitioner).*

Kalianji Singji Bhai v. The Bank of Madras.

Provincial Insolvency Act S. 4—Act of Insolvency by agent—Service of notice on agent,—Sufficiency of—Rule 21 cl. (3) under S. 51—S. 16, Scope of—Relation back—Confined to dealings with property—No Termination of agency.

The appellant was the sole partner of a firm carrying on money-lending business at Calicut with the head office at Bombay. The local agent gave notice that the firm had stopped payment at Bombay on which one of the creditors applied in Calicut that the appellant might be declared an insolvent. The appellant was declared an insolvent after serving notice on the local agent who appeared and objected to his principal being so declared.

Held, that having regard to S. 4 Explanation, of the Provincial Insolvency Act the appellant could be declared an insolvent on the act of insolvency committed by the agent and that service on the agent was sufficient service.

The rule enacted in S. 16 of the Provincial Insolvency Act that the order of adjudication relates back to the date of the presentation of the petition affects only dealings with property and has not the effect of terminating the agency as on that date.

Appeal against order of the District Court of South Malabar in Insolvency Petition No. 7 of 1912.

This appeal came on for hearing on Friday, Monday and Tuesday, the 13th, 16th and 17th days of November 1914 before Mr. Justice Oldfield and Mr. Justice Tyabji.

K. R. Subramania Sastri for Appellant.

D. Chamier for Respondent.

The Court made the following

ORDER:—The circumstances in which the learned District Judge held that notice had been duly served on the debtor under

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* A. A. O. No. 62 of 1914. 14th September 1915.

Kalianji Singji Bhai v. The Bank of Madras.

Section 12 of Provincial Insolvency Act are not clear. We must therefore call for a finding on the issues :—

1. What notices were served on the debtor directly or on his agent Visram.

2. What attempts to serve the former were made by registered letter or otherwise ? and was Rule XXI (3) of the Rules framed under the Act complied with ?

3. Was it found impossible to serve the debtor direct ? If so what were the circumstances in which a valid service was effected on Visram ?

Fresh evidence may be adduced and the findings will be submitted within six weeks from the date of receipt of records. Seven days will be allowed for filing objections.

[In compliance with the above order, the District Judge of South Malabar submitted his findings as below :—

On issue (1) that no notice was served on the debtor directly ; that copy of the notice was affixed to the outer door of the dwelling house of Hirji Visram as he was unwilling to sign and accept the notice. On issue (2), that an attempt was made to serve the debtor by the petitioners' Vakil by sending a registered letter accompained by a copy of the petition and that there was no compliance with Rule XXI (3) of the rules framed under the Act. On issue (3) that it was impossible to serve the debtor direct, that the Muktiarnama given to Visram gave him sufficient authority to represent the debtor and service effected on Visram was valid.

K. R. Subramanya Sastri for Appellants.

D. Chamier instructed by *David Brightwell* and *Moresby* for Respondents.

The Court delivered the following

Judgment :—The appellant is the sole partner of the firm of Raysee Amerchand carrying on a money-lending business at Calicut with a head office at Bombay. On December 3rd 1912 the Agent of the Bank of Madras, the respondent in the case, presented a petition to the District Judge to adjudicate the appellant insolvent and to appoint an *ad interim* Receiver. On December 6th a notice signed by the Sheristadar of the District Court (by order) went to the local agent to inform him that a petition to declare the appellant insolvent was posted for January 21st and that he might appear and show cause against it. The agent Visram Sait "refused to receive the

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notice on the ground that his master should be made a party," and it was served on him by affixture. On December 7th a notice of the hearing together with a copy of the petition was sent by the respondent's pleader through registered post to the appellant at Mandavi in Cutch where he was thought to be residing but it was returned to the sender as the addressee had "Left, Particulars not known." At the hearing on January 21st notice was ordered by the Court to go to the principal debtor for March 11th, but admittedly no further attempt was made to serve a notice of the date of hearing on the debtor in person as it was found impossible to do so. On March 11th the notice given to the local agent was declared by the Court to be sufficient, and on the same date the said agent filed in Court a counter-petition on behalf of the appellant describing himself as his muktiar. The proceedings were fully contested and ended on December 19th, 1913, in an adjudication of the debtor under Section 16 of the Provincial Insolvency Act as insolvent.

A number of objections have been raised to the sufficiency of the service of the notice on the agent and our attention has been called to the fact that the agent did from the first object to receiving notice for his principal.

These objections may be briefly answered by a reference to the provisions of the Provincial Insolvency Act and the rules framed under the authority of section 51. Section 12 (3) provides that in cases where the petition is by the creditors notice of the date for hearing shall after admission of the petition be served on the debtor in manner provided for service of summons. Section 47 directs that Courts of Insolvency shall, subject to the provisions of this act follow the procedure followed in regard to Original Civil Suits. Order 5, Rule 12 of the Civil Procedure Code declares that wherever it is practicable, service shall be made on the defendant in person, unless he has an agent empowered to accept service, in which case service on such agent shall be sufficient. Rule 13 allows service to be made on any agent who at the time personally carries on business or work for a person who does not reside within the Court's jurisdiction, in any suit relating to business or work. O. 3 R. 3 (1) makes service on a recognised agent as effectual as if it was on the party in person unless the Court directs otherwise. A recognised agent includes a person holding a power of attorney authorising him to

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make and do such appearances, applications and acts on behalf of such parties (Order 3, Rule 2). Exhibit J, the power of attorney held by Visram Sait from the appellant authorizes him 'to defend all suits, appeals and actions' in the Courts of this Presidency to which the appellant may be a party and 'generally to act for him and to do all things and acts that may be necessary and that the agent may think fit for the complete discharge of his business effectually, completely and to his benefit.' Thus there can be no question that there was a valid service under Civil Procedure Code on the appellant's agent, and that the Court declared it to be sufficient.

Turning to the rules framed by the High Court under S. 51 of the Insolvency Act, we find that Clause 3 of Rule 21 provides that notice of the date of hearing of an insolvency petition, if the petition is by the debtor, be sent by the Court by registered post to all creditors and if the petition is by a creditor, shall be sent to the debtor, not less than fourteen days before the date of hearing. Notice was not sent to the debtor in this case by the Court through registered post, although the Bank's vakil attempted vainly, as already mentioned, to communicate a notice and a copy of the petition to appellant in a registered letter. As we read the rules, however, the sending of a notice by registered post is chiefly intended to provide for the information to be given to creditors on a petition by debtor and to particularize the words 'such other manner as may be prescribed' in S. 12, clause (2). We are not aware of any practice of sending notices of the hearing to debtors through the post in the first instance upon a creditors' petitions. Notice to debtors is otherwise provided for by Rule 5, clause (2) and by the Rules under the Civil Procedure Code. If a debtor gets notice of the hearing served on his authorized agent like a summons, he cannot reasonably complain that he did not also receive a similar notice from the Court through the post and his objection might be answered by a reference to section 99 Civil Procedure Code. Rule V, Clause 2 of these rules directs that a copy of an insolvency petition presented by a creditor shall be served together with the notice of the date for hearing 'on the debtor or upon the person upon whom the Court orders notice to be served.' It is not required that such an order should be in writing. In this case the notice was addressed to the agent and was signed by the District Court Sheristadar (by order). It was served under Order 5,

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Rule 17, Civil Procedure Code, more than 14 days before the hearing on January 21st. Presumably this was a good notice to the agent and as the agent appeared and filed a counter-petition on March 11th in which he did not raise any objection to the manner or time of service, he must be deemed to have waived any objection that he might have had to any supposed irregularities in the giving of notice.

So much for the question of notice. More substantial objections have been raised to the capacity in law of an agent to represent a debtor in insolvency proceedings, and to the capacity of a debter to be adjudicated insolvent upon an act of insolvency committed by his agent. It is argued that as orders of adjudication relate back to and take effect from the date of the presentation of the petition on which they are made [*Vide* Section 16, Clause (1)], and as the agency of Visram Sait terminated under Section 201 of the Contract Act by his principal being adjudicated an insolvent therefore the agency must be taken to have ceased on the presentation of the petition, and that by the appointment on December 3rd of a Receiver, in whom the property of the debtor vested, the business of the firm could no longer be carried on by the agent and *ipso facto* his power of attorney became void. But it is evident from a reading of the whole of this section from clauses 2 to 6 that they all deal with the property of the insolvent. This was made clear in the case of *In re Pollitt* [1], where in treating of the corresponding Section of the English Bankruptcy Act, Lord Esher observed, "The result of the relation back is that all the subsequent dealings with the debtor's *property* must be treated as if the bankruptcy had taken place at the moment when the act of bankruptcy was committed". The agent's power of attorney in this case empowered him to do other acts besides carrying on the trade and dealing with his property and one of those acts must be taken to be to stave off bankruptcy orders against the firm.

As regards the jurisdiction of the Courts to adjudicate persons insolvent upon acts of insolvency committed by their agents, there appears to be a difference in the law as it stands in England and in India.

In *Ex-parte Blain* [2] it was held that an act of bankruptcy must be a personal act or default and could not be committed

1. (1893) I Q. B. 455. 2. (1879) 12 Ch. D. 522.

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through an agent. This principle was followed in *Cooke* v. *Charles A. Vogeler Co*,[1] another case of a foreigner domiciled and resident abroad having business in England, but in both of these decisions it was conceded that if the law had been different the Courts would have had to take a different view.

In India it has been expressly enacted as an explanation to S. 4 of the Provincial Insolvency Act that for the purposes of that section which deals with acts of insolvency committed by a debtor, the act of an agent may be the act of the principal. It was accordingly held in *In the matter of Brij Mohan Dobay* [2] that the departure of an agent from the place of business did constitute an act of insolvency on the part of the principal.

In this case if the fact that the firm at Bombay of which appellant was partner had suspended payment, of which Mr. Lamb states that the agent gave him notice, be taken as the act of insolvency giving rise to these proceedings, there is no need to consider the effect of the agent's act as agent, as the suspension of payment at Bombay was the act of the principal, but if the suspension of payment by the branch at Calicut and the inability of the agent there to meet his bills in Calicut to which Mr. Deane has testified, be taken into account, then we have no hesitation in applying S. 4 of the Act and in holding that the order of adjudication based on such an act of insolvency was a prefectly valid order. We agree in holding that an act of insolvency has been proved. We dismiss the appeal with costs.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.
[FULL BENCH].

Present:—Sir John Edward Power Wallis, Kt., Chief Justice, Mr. Justice Ayling and Mr. Justice Sadasiva Aiyar.

Soundararajam, minor, by his mother and next friend Kannammal — *Appellant* * (*Plaintiff*)

v.

T. R. M. A. R. R. Arunachalam Chetty (died) and others. — *Respondents* (*Defendants*).

Soundararajam v. Arunachalam Chetty.

Hindu Law—Illegitimate son of Sudra—By continuously and exclusively kept concubine—Dancing girl and prostitute—Right to succeed to joint family property.

The illegitimate son of a Nattukottai Chetti by a woman kept continuously and exclusively by him who was a dancing girl and following the profession of a prostitute before she came into his keeping, is entitled to succeed.

* A. No. 74 of 1911. 23rd March 1915.

1. (1901) A. C. 102. 2. (1897) 2 C. W. N. 306.

Soundararajam v. Arunachalam Chetty.

Appeal in *forma pauperis* against the decree of the Court of the Temporary Subordinate Judge of Ramnad in O. S. No. 59 of 1910.

The appeal came on for hearing before the Chief Justice and Seshagiri Aiyar, J. in the first instance on 30th November and 1st December 1914.

[The facts are fully set forth in the order of reference].

K. N. Aiyah Aiyar for the Appellant.

B. Sitarama Rao for Respondents.

The Court made the following

ORDER OF REFERENCE TO A FULL BENCH :—

The Chief Justice.

The Chief Justice:—The plaintiff in this suit as the illegitimate son by a dancing woman of the late Ramasawmi Chettiar, a Nattukottai Chetty, seeks to recover a one-third share of the joint family properties as against the legitimate son, the 1st defendant who would otherwise take the whole by survivorship. The Subordinate Judge found that the paternity of the plaintiff was not proved and dismissed the suit. We are unable to agree with this conclusion.

The deceased as found by the Subordinate Judge appears to have become acquainted with the plaintiff's mother in 1900 when she had for some years been carrying on the profession of a dancing girl and a prostitute. He set her up in a house at Srirangam near Trichinopoly where he carried on business, and lived with her there for some years. Shortly before the plaintiff's birth early in 1903 he was imprisoned for fraud, and the correspondence shows that he regarded the child about to be born as his and that subsequently he recognised it as such. The correspondence also shows that his legitimate son, the 1st defendant used to live in the house with his approval. In 1905, when the plaintiff was a little over two years old, the deceased refused any longer to maintain him and his mother, who petitioned the Assistant 1st Class Magistrate on his behalf for maintenance in Exhibit III. The order of the Assistant 1st Class Magistrate, which was rejected by the Subordinate Judge, but admitted by us as evidence of the conduct of the deceased, with reference to this claim, shows he made no serious attempt to contest the petition or show grounds for doubting his paternity, and in these circumstances very little weight attaches to the fresh evidence as to the conduct of the plaintiff's mother prior to his birth which has now been put forward for the first time. Further, that evidence in itself is of a

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The Chief Justice.

very worthless kind, and is more than counterbalanced by the letters of the deceased which show that he was at one time much attached to the plaintiff and recognised him as his son. The question then arises whether the plaintiff as the son of the deceased by a woman of the position and antecedents of his mother is entitled to claim a share of the joint family property as the illegitimate son of the deceased. It must now be taken as settled that the illegitimate children of the higher castes are not entitled to inherit, *Bhaiya Sher Bahadur* v. *Baiya Ganga Bakhsh Singh* [1], but it is otherwise with Sudras. All the Courts recognise that the son of a Sudra by a *dasi* is entitled to inherit. Manu (IX, 179) and Yajnavalkya (II. 133) mention not only a *dasi* but also the wife of a *dasa* or slave, and the Dayabhaga adds " or other unmarried woman" which was pointed out in *Padala Krishna Rao* v. *Padala Kumarajamma* [2] may merely mean not married to the father of the child. As pointed out in *Krishnayyan* v. *Muttusami* [3] the words " or other unmarried woman " do not occur in the Mitakshara or other commentators of the South. The Mitakshara merely speaks of a son begotten by a Sudra on a *dasi*. In a recent case in *Chatturbhuj Patnaik* v. *Krishna Chandra Patnaik* [4]. Mookerjee and Beachcroft, JJ., have given good reasons for doubting the correctness of the Calcutta decision that under the Dayabhaga this must be read as meaning a woman in the position of a slave, and have refused to follow these decisions in a case arising under the Mitakshara, agreeing in this with our own and the other High Courts. In this Court it is also well settled that the son must be born of a continuous concubine, and also that he must not be the issue of a connection that is incestuous and adulterous, (V. *Krishnamma* v. *N. Papa* [5]) though the latter condition is said to be disregarded in Bombay, *Rahi and others* v. *Govinda Valad Taja* [6]. The question then is, are there any further restrictions ? In *Krishnayyan* v. *Muttusami* [3] it is said that the reason of the rule is that *dasi's* son succeeded not as a slave but as the son of one who was in the position of a substitute for a wife though not legally married. It is not clear that this meant more than that she must have been a continuous concubine, but it is now suggested very largely on the authority of this passage that she must have been qualified to

1. (1913) L. R. 41. I. A. 1 : 26 M.L.J. 291.
2. (1912) 15 I. C. 340.
3. (1883) I L. R. 7 M. 407 at 411.
4. (1913) 17 C.W.N. 442.
5. (1868) 4 M. H. C. R. 234.
6. (1875) I.L.R. 1 B. 97

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The Chief Justice.

marry the father. I do not think the learned Judges who decided *Krishnayyan* v. *Muttusami* [1] intended to lay down any such rule, as one of them, Muthusawmi Aiyar, J. in a subsequent case, *Brindavana* v. *Radhamani* [2], expressly reserved the question whether a dancing girl could not give up her profession and be the mother of illegitimate children within the meaning of the Mitakshara Law. In *Karuppannan Chetti* v. *Bulokam Chetti* [3], to which Subramania Aiyar, J. was a party, it was held that the sons of a woman continuously kept by the father as a concubine whose connection was neither adulterous nor incestuous were in this Presidency entitled to inherit, but in *Annayyan* v. *Chinnan* [4], White, C. J. and Benson, J., held that the son of a child widow, who had lived with the father as his concubine could not inherit. This ruling appears to have been based on the finding that re-marriage of widows was forbidden among Sudras of the class to which the father belonged, and that the father and mother had been outcasted by their community in consequence of their living together. In these circumstances the connection was treated as one in violation of or forbidden by the father's customary law. In *Sundaram* v. *Meenakshi Achi* [5] it was held by Sankaran Nair and Ayling, JJ., that the son of a dancing girl who had formed her first connection with the father and lived with him ever since was not entitled to inherit apparently on the ground that she had not severed her connection with the temple and so could not fulfil the duties of a wife relying on the passage in *Krishnayyan* v. *Muttusami* [1] which I have already mentioned. In *Meenakshi* v. *Muniandi Panikkar* [6] where however the point did not arise for decision, my learned brother expressed the view, that illegitimate children of Sudras were allowed to inherit because among them continuous concubinage was equivalent to marriage and in the judgment in the present case which I have had the advantage of reading, he has come to the conclusion that the plaintiff is not entitled to succeed because his mother in his opinion was not qualified to marry the plaintiff's father. The question is one of considerable importance and, as the authorities are not uniform, I think it would be better before deciding it to refer to a Full Bench the

1. (1883) I. L. R. 7 M. 407.
2. (1888) I. L. R. 12 M. 72 at 86.
3. (1899) I. L. R. 23 M. 16.
4. (1910) I.L.R. 33 M. 366=20 M.L.J. 355.
5. (1912) 16. I. C. 787.
6. (1914) 27 M. L. J. 358.

question whether in the circumstances set out above the plaintiff is entitled to share in the joint family property.

Seshagiri Aiyar, J.—This is a suit by the son of a woman belonging to the dancing girl's caste for a share in the property of one Ramasawmi Chettiar who is alleged to have kept the plaintiff's mother as his concubine. There is an alternative claim for maintenance. The 1st defendant is the son of the deceased by his wedded wife, the 2nd defendant. The defendants denied that the plaintiff was born to Ramasawmi Chetti. The Subordinate Judge came to the conclusion that the plaintiff was not born to the deceased and dismissed the suit. In the view he had taken, it was not necessary to consider the question of maintenance. The plaintiff has appealed.

I am unable to agree with the Subordinate Judge regarding the plaintiff's paternity. It is in evidence that Ramasawmi Chetty carried on business as a banker at first in Trichinopoly. He subsequently took a mortgage of a house in Srirangam in November 1901 (Ex. G). There can be no doubt that the plaintiff's next friend, the dancing girl, was living in this house along with her sister and her paramour. The oral evidence on this point is consistent and is strengthened by Ex. E. (dated 25th December 1902) which was a rent-deed executed to Ramasawmi Chetty's father by Subbu Singh, the paramour of the sister. The plaintiff was born in February 1903. Ramasawmy Chetty was then in jail, having been sentenced to 6 months' rigorous imprisonment for criminal breach of trust. He came out of the jail in May 1903. The evidence given in this case admits of no doubt that from about June 1900, till Ramasawmi was sent to jail, he kept this woman as his concubine and lived from November 1901 in the same house with her till his conviction. Evidence has been let in that others were in the habit of frequenting the house. This is denied by the plaintiff's witnesses. It is true that there is no presumption as in the case of a married woman that a child born during the period of concubinage is the paramour's. The status of the woman and the fact that others had access to her are factors which negative such a presumption. In this case, the woman was living in the same house with Ramasawmi and he seems to have felt no doubt that the child born in February 1903 was his. In Exhibit A 8, written after the release from jail to this woman he says, "you go as you please. I do not mind it. Support the Thambi and hand over to me. It is only for that, that

I have written this letter". It is conceded that Thambi referred to in this letter is the plaintiff. In Exhibit A 6, he calls himself the husband of the woman. In Exhibit A 4 he calls her his Abhimana Stri. In Exhibit B 2, written from the jail, he makes enquiries as to whether the child was delivered and asks Subbu Singh to see that the woman lives a respectable life. These letters coupled with the oral evidence in this case and the fact of their residing together in the same house leave no room for doubt that Ramasawmi Chetti was the father of the plaintiff.

Before dealing with the question of law which arises in the case, I should like to point out that I see no reason to disbelieve the evidence which has been adduced to the effect that when this woman became the concubine of Ramasawmi, she was not a virgin. She was then, according to one account, 23 years of age, and according to another, 27 years. It was admitted that she was a native of Ariyalur and that she was dedicated as a *dasi* in a temple there. Women of this class soon fall into evil ways. Mr. Aiya Aiyer did not seriously argue that she had not known others before she became Ramaswami's concubine. The evidence and the probabilities are against it. My conclusion is that she had been in the keeping of others, before she came to Ramaswami Chetty.

The point for decision is whether to a child born to a woman of the class and of the antecedents I have mentioned, the text of Yajnavalkya contained in the Mitakshara, Chapter 1, Section 12 applies. The sage says: "Even a son begotten by a Sudra on a famale slave, may take a share by the father's choice." (Stokes' Hindu Law Books, page 426). Manu states the law in a slightly different way (Chapter IX, Section 179). The view of the Calcutta High Court in *Narain Dhara* v. *Rakhan Gain* [1] that the term *dasi* in Yajnavalkya's text means only a female slave has not been accepted in Madras. See *Krishnayyan* v. *Muttusami* [2] and *Brindavana* v. *Radhamani* [3]. On the other hand, the interpretation of the text by Jimutavahana that the concubine should be unmarried has been regarded as correctly expressing the meaning of the sage. A further limitation that the kept woman must have been a continuous concubine has been insisted upon. (*Datti Parisi Nayudu* v. *Datti Bangaru Nayudu* [4], *Kuppa* v. *Singaravelu* [5],

1. (1875) I. L. R. 1 Cal. 1.
2. (1883) I. L. R. 7 M. 407 at 412.
3. (1888) I. L. R. 12 M. 72 at 86.
4. (1868) 4 M. H. C. R. 204.
5. (1885) I. L. R. 8 M. 325.

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Karuppannan Chetti v. *Bulokam Chetti* [1] *Rahi* v. *Govinda Valad Taja* [2], and *Dalip* v. *Ganpat* [3]). The object of these restrictions has been to confine the special rule of inheritance within strict limits, in order that no encouragement beyond what is absolutely within the letter of the law may be afforded. Therefore to enable an illegitimate son to lay claim to a share in his father's property, his mother must be a Sudra, must have been unmarried and must have been kept by the putative father as a continuous concubine. The question is, whether the plaintiff's next friend satisfies all these requirements. I have come to the conclusion that in two essential particulars she is outside this rule of law.

In the first place, a dancing girl is not a Sudra. Manu in Chapter VIII, S. 415 describes a *dasa* or servant thus. "There are servants of seven sorts; one made captive under a standard or in battle, one maintained in consideration of service, one born of a female slave in the house, one sold, or given, or inherited from ancestors and one enslaved by way of punishment on his inability to pay a large fine." Narada gives 15 sources from which a *Dasa* can be drawn. It is not necessary to refer to them as Balambhatta points out that the 15 classes are really amplifications of Manu's seven classes. It need hardly be mentioned that a *Dasi* (the feminine of Dasa) should belong to one of these seven classes. Kulluka Bhatta in commenting upon Manu's text points out that a *dasi* must belong to one of the seven classes. Reference may also be made to the well known dictionary, the "Sabda-Kalpa Druma." It is clear that a dancing girl does not come under any one of the seven classes. These seven classes constitute with those born as such, the Sudra caste. The matter is made very clear by the commentary of Vijnaneswara (Chapter 24 of Acharadhyaya of the Mitakshara entitled "Stri-Sangrahana Prakarana"). The text of Yajnavalkya prescribes varying degrees of punishment for men and women who go wrong. In sloka 272 the Rishi prescribes a different kind of punishment for a man cohabiting with a Vesya or dancing girl from that prescribed for one having connection with a *Dasi*. In commenting upon the term *Dasi*, Vijnaneswara, at the outset of his commentary upon sloka 290 says "उक्तलक्षणा वेर्णास्त्रियोदास्य" (*"Ukta-lakshana varna-striyodasyah"*). (Caste women of the above description are slaves). The reference here is to the 14th Prakarana and to the four castes.

1. (1899) I. L. R. 23 M. 16. 2. (1875) I. L. R. 1 B. 97.
3. (1886) I. L. R. 8 A. 387.

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He then says that prostitutes are common to all men. He is met by the objection that there is nothing in the Shastras to countenance the theory that certain women are common to all men. The objector further points out that such women should belong to one of the four castes. It is desirable to quote here the exact language used by the objector. "Again, by becoming a slave, a woman does not cease to be governed by her own personal law, for slavery deprives her of her independence and not of the law which otherwise governed her person. Nor are dancing girls common to all men, for besides the four castes and the caste resulting from the union of a male with a female of a lower caste, there is no separate caste in which women are common. If the dancing girls fall within those castes they are, as already stated, not common. If, on the other hand, they belong to a class resulting from the union of males with females of higher castes, they are still further from being common. When, therefore, people have sexual intercourse with them they are degraded for repeating a condemned act; and as a degraded (that is, declared an outcaste) person is ordained not to be associated with, dancing girls are not fit to be common to all people." The answer given to these objections is very explicit. The commentator justifies his position that the dancing girl herself is not to be punished as in the case of others, because she commits no sin in following her profession. On the question, whether she belongs to one of the four castes, the answer is in these terms: "What was said therefore that in the absence of any such separate caste, the dancing girls must belong to the caste system by the process of reasoning that, being human beings, they must, as Brahmans and others, belong to the caste system, is wrong, as the caste system, does not cover the entire humanity, there being distinct classes, like the son born to a paramour while the husband is living and the widow's son. Hence dancing girls form a separate class which has been in existence from time immemorial, which has resulted from the union of men of superior or equal caste with them (dancing girls) and whose profession is prostitution, and as this class, like that of Brahmins and others, has been well known to people, it is but fit that it should be recognised. Nor is the popular conviction unsupported by authority. It is said in the Skanda Purana 'There was a celestial damsel named Panchachuda and her progeny formed the fifth caste of dancing girls.' Therefore, not having the institution of marriage, they

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incur no sin in having sexual intercourse with men of superior or equal caste, nor are they liable to punishment". I have made these long quotations from the commentary because the statement therein contained is clear and decisive of the question before us. Some commentaries give a different origin to the term Vesya. It is not necessary to pursue the subject further. My conclusion therefore is that a dancing girl does not belong to the Sudra caste.

There has been no direct decision on this point. In *Brindavana* v. *Radhamani* [1], Sir Arthur Collins and Mr. Justice Muthuswami Aiyar left it open "whether dancing girls may not give up their profession and become mothers of illegitimate children within the meaning of the Mitakshara law." Mr. Justice Sankaran Nair in his Judgment in Appeal No. 56 of 1908 considered it unnecessary to decide the point. In *Chellammal* v. *Ranganathan Pillai* [2], the question whether a dancing girl can be a continuous concubine as described in the Mitakshara was not considered. *Ananthaya* v. *Vishnu* [3], was a case of maintenance. So also was the case decided by the Judicial Committee in *Muthuswamy Jagaveera Yettappa Naicker* v. *Venkateswara Yettayya* [4]. Mr. Aiya Aiyar contended that the term *Dasi* has been interpreted by Professor Monier Williams and others to include a dancing girl. This is beside the point. These dancing girls have assumed in Southern India the appellation of *Dasis* and *Devadasis*. Consequently the compiler of the lexicon says that the term is also applicable to dancing girls. This will not assist us in finding out in what sense the Smriti writers used the term.

The second point which is equally fatal to the claim of the plaintiff for a share of the inheritance is that his mother was not an unmarried woman. It is true that she has not gone through a form of marriage with any particular individual. But as pointed out by Mr. Justice Sankaran Nair, in Appeal No. 56 of 1908, the fact of her having been dedicated to service in a temple renders her unfit for married state. Whether we accept the theory that a woman dedicated in a temple is married to the deity or not, there can be no question that the object of the farce that is gone through is to ensure that her services shall be at the disposal of the temple authorities whenever required. As Sir T. Muthuswami

1. (1888) I. L. R. 12. M. 72.
2. (1910) I. L. R. 34 M. 277.
3. (1893) I. L. R. 17 M. 160.
4. (1868) 12 M. I. A. 203.

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Aiyar points out in *Krishnayyan* v. *Muttusami*[1], in order that the illegitimate off-spring may claim a share, she must be "a substitute for a wife." Mr. Justice Sankaran Nair expresses the same opinion in the case I have already referred to. In a recent case in which I had to consider the rights of illegitimate children to inherit their mother's Stridhanam, I expressed an opinion that the provision in the Mitakshara for illegitimate off-spring contemplates that the continuous cohabitation must be equivalent to marriage. See *Meenakshi* v. *Muniandi Panikkar* [2]. I was not then aware of the pronouncement to the same effect by Sir T. Muthusawmi Aiyar and Sir C. Sankaran Nair. Mr. Justice Chandavarkar in *Tara* v. *Krishna*[3], had to consider whether a prostitute who leads a life of promiscuous intercourse can be said to be an unmarried woman. The learned Judge came to the conclusion that such a woman was neither a कन्या (Kanya) (maiden) nor a कुलस्त्री (kulastri) (married woman). I entirely agree with this conclusion. In Mitakshara, Chapter 1, S. 12 placitum 3, the author says that the illegitimate son of the three higher castes are not entitled to inheritance. (See also *Chuoturya Run Murdun Syn* v. *Sahib Purhulad Syn* [4] and *Roshan Singh* v. *Balwant Singh* [5]. It has further been held that even in the case of Sudras, if the connection is adulterous, or incestuous, the son of such a union cannot claim a share in the father's property. *Muthuswamy Jagaveera Yettappa Naicker* v. *Venkata Subba Yettia*, [6], *N. Krishnama* v. *N. Papa* [7] and *Venkatachella Chetty* v. *Parvatham* [8]. The reason of these exclusions is that the woman with whom such intercourse is maintained cannot be a "substitute for a wife." Therefore unless the woman who is kept as a concubine could have been legally married by the paramour, the son will not be entitled to a share, and a dancing girl, being outside the *Varnas*, is not eligible for marriage to persons within the *Varnas*. I am aware that it is open to persons belonging to the dancing girls' caste to become married women. It is of constant occurrence in Southern India; but that is only among their own people. If she is once dedicated to a temple, she cannot be married even among her castemen. As Mr. Justice Sankaran Nair points out in Appeal No. 58 of 1908,

1. (1883) I L. R. 7 M. 407.
2. (1914) 27 M. L. J. 353 at p. 360.
3. (1907) I. L. R. 31 Bom. 495.
4. (1857) 7 M. I. A. 18.
5. (1899) L. R. 27 I. A. 51.
6. (1865) 2 M. H. C. R. 293.
7. (1868) 4 M. H C. R. 234.
8. (1875) 8 M. H. C. R. 134.

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a woman thus dedicated puts herself under the power of the temple authorities and is no longer a free agent; and she becomes a साधारण स्त्री (Sadharanastri) in the language of Vijnaneswara. Moreover it would be preposterous to speak of such a woman as a *Kanya* or an unmarried woman. In the present case, as I pointed out already, this woman had known other men before she became the concubine of Ramasami. She was not a *Kanya* at the time. I am clearly of opinion that the term "unmarried" cannot apply to a woman of such antecedents. It is necessary that the exceptional rule stated in the Mitakshara should be applied with great care and caution. The rule, under no circumstances, should be extended beyond what the letter of the text warrants. The interests of public morality and the changes which time has brought about have to be taken into account in applying the texts of Hindu Law. It is on that account that certain texts have been regarded as obsolete. Fortunately in this case the law as explained by Vijnaneswara and the conditions of the times both favour the non-applicability of Yajnavalkya's text to the class of women known as dancing girls. I have assumed throughout that Ramaswami was a Sudra, as it was not contended before us that a Nattukottai Chetty did not belong to that caste.

For the reasons given by me the claim of the plaintiff for a share in Ramaswami's property is in my opinion unsustainable. He is undoubtedly entitled to maintenance. As the learned Chief Justice considers it desirable that the question arising for decision in this case should be referred to the decision of a Full Bench, I agree in the order proposed.

K. N. Aiya Aiyar for appellant.

A dancing girl is a Hindu and is within the pale of Hindu Law. The judgment of Seshagiri Aiyar, J. assumes that she must have every qualification for being a lawful wife. It is based upon some observations of Sir T. Muthuswami Aiyar, J. in *Krishnayyan* v. *Muttusawmi* [1]. Seshagiri Aiyar, J. seems to think that a dancing girl is not even a Sudra woman; on the other hand she is assigned a place higher than that of a Sudra woman.

1. (1883) I. L. R. 7 M. 407, 410).

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[*Sadasiva Aiyar, J.*—Is there any case which lays down that a dancing girl belongs to the Sudra caste ?]

No. The text giving the right of inheritance to the illegitimate son of a Sudra is Mitakshara Ch. 1, S. 12 The words are " born to a dasi by a Sudra". The cases decided with reference to this text are *Muthusawmy Jagaveera Yettappa Naicker* v. *Venkata Subba Yettia* [1], on appeal *Muthuswamy Jagaveera Yettappa Naicker* v. *Venkateswara Yettaya* [2]. The woman belonged to the dancing girl caste and had been dedicated as a *dasi* to the temple. The question before us was, however, not raised and decided. I rely upon that case for the purpose of showing that the contention now urged by the other side, was not thought of as a possible defence. There may be a question as to whether the illegitimate son of a Surda by a woman outside the pale of Hindu law altogether is entitled to inherit his estate. See *Lingappa Goundan* v. *Esudasan* [3].

[*Chief Justice.*—In those cases the view seems to have been that a dancing woman could not be a female slave within the meaning of the text.]

[*Sadasiva Aiyar, J.*—I think "dasi," simply means a Sudra woman.]

The word " dasi ", if it has any special significance was intended to denote a woman under exclusive concubinage.

[*Chief Justice.*—You say that in the case in *Muttuswamy Jagaveera Yettappa Naicker* v. *Venkata Subba Yettia* [1] Holloway, J. held that the dancing woman in that case was a woman of the Sudra caste.]

Yes—[*Sitarama Rao*—The woman in that case was not herself a dancing girl, though she was of the dancing girl caste.]

[*Chief Justice.*—But she was the daughter of a dancing girl.]

Yes, though the woman herself did not follow the profession of a dancing girl because she was taken by the Zemindar. In *Anantayya* v. *Vishnu* [4] an illegitimate of a Brahmin by a dancing girl was held entitled to maintenance. The fact that the woman was a dancing girl was held to be material only for the purpose of considering whether the connection was casual or continuous.

[*Chief Justice.*—That case is one of maintenance and not of inheritance.

1. (1865) 2 M. H. C. R. 293. 2. 12 M. I. A. 203 (204).
3. (1903) I.L.R. 27 M. 13. 4. (1893) I. L. R. 17 M. 160 (162).

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Even illegitimate sons of Brahmins are held to come in only under this text. In *Brindavana* v. *Radhamani* [1] doubt is thrown by Muthuswami Aiyar, J., on the question whether a dancing girl cannot give up her profession and become a "dasi" within the meaning of the text. *Sundaram* v. *Meenakshi Achi* [2] is against me. But it simply follows *Krishnayyan* v. *Muttusami* [3].

[*Chief Justice.*—It is on the observation of Muthuswami Aiyar, J. that the whole of Seshagiri Aiyar, J's. judgment is based. It is not to the effect that the woman must be capable of becoming a wife. It is simply to the effect that the concubinage must be continuous.]

At p. 412 of 7 M. it is stated that the right to inherit attaches not to the status of a slave but to exclusive concubinage.

[*Ayling, J.*—The case in *Sundaram* v. *Meenakshi Achi* [2] is distinguishable on the ground that the woman in that case was following her profession, attending the temple, performing services therein and receiving the emoluments attached to the office.]

In *Chellammal* v. *Runganatham Pillai* [4] the woman was a prostitute. Nevertheless the son was entitled to a share. The word "dasi" in the text includes a prostitute. See *Rahi and others* v. *Govind Valad Taja* [5]. Dr. Jolly's Tagore Law Lectures on Hindu Law of Partition and Inheritance for 1883 p. 187; Dr. Burnell's Translation of Dayavibhaga introduction. Elberling's Treatise on Inheritance, Gift, etc., Arts. 60, 71. *Chaitarbhuj Patnaik* v. *Krishna Chandra Patnaik* [6].

The word "unmarried" merely means unmarried to the man and not a woman who has not married but who is capable of marriage. The following cases show how the word "unmarried" came to be used in reference to the word "dasi" in the text. *Karuppannan Chetti* v. *Bulokam Chetti* [7] *Padala Krishna Rao* v. *Padala Kumarajamma* [8] *Venkatachella Chetti* v. *Parvatham* [9] *Annayyan* v. *Chinnan* [10] *Muttuswami* v. *Venkateswara* [11]. Seshagiri Aiyar, J. relies upon *Tara* v. *Krishna* [12].

1. (1888) I. L. R. 12 M. 72.
2. (1912) 16 I. C. 787.
3. (1883) I. L. R. 7 M. 407. (410).
4. (1910) I. L. R. 34 M. 277 (281).
5. (1875) I. L. R. 1 B. 97 (1089).
6. (1913) 17 C. W. N. 442
7. (1899) I. L. R. 23 M. 16.
8. (1912) 15 I. C. 840.
9. (1875) 8 M. H. C. R. 143.
10. (1910) I. L. R. 33 M. 366.
11. (1868) 12 M. I. A. at 220.
12. (1907) I. L. R. 31 B. 495.

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B. Sitarama Rao for Respondent.

[*Sadasiva Ayar, J.*—Is not a Sudra a *dasa* and a Sudra woman a *dasi* according to the original Sastras ?]

According to Yajnavalkya and Mitakshara, the word "dasi" originally meant only a female slave. The course of decisions has brought in also other classes.

[*Sadasiva Aiyar, J.*—According to the Sastras Sudras have no *form* of marriage.]

Sudras adopt the form of marriage prescribed for Brahmins. The passage in the Mitakshara relied upon by Seshagiri Aiyar, J. is in Gharpure's English Translation of texts of Mitakshara p. 406. According to Mitakshara there is a 5th caste and the Vesiyas or the dancing girls form that caste. They do not therefore belong to the 4 castes.

[*Sadasiva Aiyar, J.*—But why should the present-day dancing girls be held to belong to the Vesya caste and not to the class of female slaves ?]

The Author makes a distinction between family women and the Sadharana or common women and among family women between a kanya and a married woman.

[*Sadasiva Aiyar, J.*—But the text says first, that illegitimate sons are to be maintained and then proceeds to state that sons of *dasis* by a Sudra are entitled to inherit.]

The only texts are Manu Ch. IX Verse 179 (Sacred Books of East Series). Mitakshara Ch. I, S. 12. The Mitakshara intended the right to be confined to the son of a slave and that although the decisions have applied the text to other cases, it ought not to be extended to the case of sons of prostitutes. "Dasi" in the text is one capable of marrying the man. *Krishnamma* v. *Pappa* [1].

[*Chief Justice.*—The case only held that issue of adulterous or incestuous connection are not entitled to inherit. It did not hold that the woman must be capable of being married.]

If the word "dasi" in the text simply means a Sudra woman, why should not the text be held to cover the case of issue of incestuous or adulterous connection ? There is no such restriction

1. (1868) 4 M. H. C. R. at 284.

in the text and the restriction is based only on the view that in such a case the woman could not have married the man. *Dasi* is a secondary wife and all those conditions which are necessary in the case of a proper wife are also necessary in the case of a *dasi.* With the exception of the case reported in 34 M. in no other case cited for the other side was the woman a dancing girl. In some of them, the women were of the dancing girl caste.

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A dancing girl cannot marry because she is not a virgin. It is only a virgin that can marry. *Dalhibai* v. *Soonderji* [1]. Dancing girls cannot marry after consecration. *Ramani Ammal* v. *Kulanthai Nachiar* [2].

In the present case, the woman was a prostitute. Dayabhaga Ch. V, Verse 14. Krishnaswami Aiyar's Translation of Smrithi Chandrika pp. 63, 64. 3 Colebrooke's Digest (Mad. Ed.) pp. 317, 440. The son of a dancing girl may be entitled to maintenance but cannot inherit. *Annayyan* v. *Chinnan* [3].

The Court expressed the following

Opinion:—*The Chief Justice*: I have already attempted to summarise the decisions upon this subject in my order of reference and need not go over the ground again. The order of Seshagiri Aiyar, J. proceeds upon the ground that the illegitimate son of a Sudra is not entitled to inherit unless the mother was competent to marry the father, and he holds that the mother in this case was not competent on two grounds that she was not a Sudra and not an unmarried woman. After hearing the question further argued we think it is unnecessary in our opinion to consider what are the essentials of a marriage among Sudras, because we are not satisfied, that this is the text to be applied. To satisfy the tests it must be shown that the mother is a *dasi*, not that she is qualified to become a wife. As regards her being an unmarried woman the Dayabhaga no doubt mentions this, but this text has been interpreted as meaning not married to the father of the child, *Venkatachella Chetty* v. *Parvatham*, [4], *Karuppannan Chetty* v. *Bulokam Chetti* [5], *Annayyan* v. *Chinnan* [3],

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1. (1907) I.L R 31 B. 430.
2. (1871) 14 M. I. A. 346 (361).
3. (1909) I. L. R. 33 M. 366.
4. (1875) 8 M. H. C. R. 143.
5. (1899) I. L. R. 23 Mad. 16.

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Padala Krishna Rao v. *Padala Kumarajamma* [1], and this is how the passage was understood by Medatithi. However this may be, we think that the plaintiffs' mother who followed the profession of a dancing girl was not a married woman. The only other question then is, was she a *dasi* ? *Dasi* is the feminine of of *dasa* which according to MacDonnell's Vedic, Index Vol. I. P. 356, Vol. II P. 388 at first meant an enemy and was afterwards applied to conquered enemies reduced to a servile condition. The word *dasa* was long applied to this class, the term Sudra being introduced later, and even to this day *dasa* and *dasi* are in use in some parts of India as suffixes to Sudra names in the same way as Aiyar, etc., in the case of Brahmin names.

Professor Jolly in the Tagore lectures for 1883 at P. 187, draws attention to the fact that Medhatithi, who flourished before Vijnaneswara, understood the text as meaning the son of a Sudra by a woman neither married to him nor authorised to raise off-spring (according to the custom of Niyoga). Professor Jolly also refers to the fact that the term *dasi* was also understood by the commentators as meaning a prostitute, citing the Calcutta edition of the second part of the Mitakshara where the term *dasi* in a passage in Yajnavalkya is explained as meaning a lewd married woman or prostitute. He also alludes to the common use of the word in South India to denote the consecrated female dancers attached to temples. In these circumstances it seems difficult to say that women of this class are not *dasis* within the meaning of the texts. We are not satisfied that the passage of the Mitakshara cited by Seshagiri Aiyar, J. is sufficient authority for holding dancing girls to form a separate caste, though this again does not appear to be very material, as it cannot be said that according to Hindu ideas unions of this kind are regarded more unfavourably than unions founded on the seduction of an unmarried Hindu woman not belonging to this class. It has not been shown that in practice the off-spring of such unions which are very common have been regarded as having less claim to inherit than the children of concubines who had not been dancing girls.

In *Brindavana* v. *Radhamani* [2], the learned judges in their observations at p. 87, though they do not decide the point, were apparently inclined to hold that a dancing girl might become the mother of an illegitimate child within the meaning of the Mitak-

1. (1912) 15. I. C. 840.
2. (1888) I. L. R. 12 M. 72.

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shara law. The Learned Judges who decided *Sundaram* v. *Meenakshi Achi* [1] expressly reserved this point, and their decision may posibly be explained on the ground that a woman who continued to do service in the temple could not be regarded as an exclusive and continuous concubine. The limitation as to her being an exclusive and continuous concubine is not to be found in the texts and appears to have been imposed by the Courts as necessary to secure due evidence of the paternity, just as the further restriction that the connection must not have been incestuous or adulterous was imposed on general grounds of morality. The partial rights of succession which are conferred upon illegitimate children under Hindu Law may be matter for regret, but we should not, in my opinion, be justified in imposing for this reason fresh restrictions which are not shown to be supported by authority or in conformity with the practice of the community.

Ayling, J.

Ayling, J.:—I agree and need only add a few words with reference to a case relied on by the respondent's Vakil, *Sundaram* v. *Meenakshi Achi* [1] to the decision of which I was a party. The circumstances of that case, and in particular the fact that the plaintiff's mother while in the keeping of his father, did not give up her profession as a dancing girl attached to the temple made it difficult to say that the finding of the Original Court that she was not kept by him *exclusively* was wrong. Speaking for myself this consideration strongly affected the decision of the case; and I do not think the judgment of my learned brother, Sankaran Nair, J. in which I concurred, should be treated as laying down any general principle of restriction of the right of inheritance of an illegitimate son of a Sudra.

Sadasiva Aiyar, J.

Sadasiva Aiyar, J.:—The learned Chief Justice in his referring order has summarised the rulings in all the important cases on the question of the right of the illegitimate son of a Sudra to claim a share in paternal property. I may state shortly that I respectfully adopt the opinion of Sir S. Subramania Iyer, J., in the case *Karuppannan Chetti* v. *Bulokam Chetti* [2] that the son of a Sudra woman continuously kept by a Sudra father is entitled to obtain a full share in the father's property at his father's choice during the father's life-time and to obtain a half share with the legitimate sons of the father after the father's death if the connection between his father and his mother was neither adulterous nor incestuous. I

1. (1912) 16 I. C. 787. 2. (1899) I. L. R. 23 Mad. 16.

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might be permitted to state that that decision was given in second appeal in a suit which was decided by myself as District Munsif. I was inclined to hold in that case (decided so long ago as in 1896 or 1897) that the son of a Sudra male born of a permanent female concubine of the Sudra caste is, strictly speaking, not an illegitimate son but a legitimate aurasa son born of a Gandharva marriage. In the very recent case *Minakhsi* v. *Muniandi Panikkar* [1], my learned brother, Seshagiri Aiyar, J. says at page 360: "I am of opinion that this treatment" (that is, the favourable treatment of illegitimate sons of Sudras as regards right to share in paternal and ancestral property) "was due to the idea that marriage among them (Sudras) was not so strictly formal and ceremonial as in the case of the higher classes. *Continuous concubinage was regarded as equivalent to marriage* although the children of this irregular union did not rank equally with those with whose mother there was a formal marriage."

As regards the translation of the word '*dasi*' as female slave in the text of Yajnavalkya as distinguished from an ordinary Sudra female, that translation has not been accepted by the Madras and Bombay High Courts and very rightly, if I may say so with respect. *Dasa*, according to Apte's Sanskrit Dictionary, has got also the following meanings: a servant in general, a Sudra, a man of the fourth caste, the caste-title of a Sudra. *Dasi* has got the meaning of a 'female servant'. The Sudra Caste was formerly the servant caste. The members belonging to the Sudra caste even in the old days ought not to be called 'slaves' as they had very substantial rights against their masters. See also *Chatturbhuj Patnaik* v. *Krishna Chandra Patnaik*[2] as to the meanings of "dasa" "dasi" and "dasiputra". See also Manu, Chapter VIII, slokas 413 and 414 as to a Sudra being *by his natural qualities* an irredeemable servant or *dasa* of the higher castes.

When the connection between a Sudra male and a Sudra female begins in mutual love and they live together as husband and wife continuously by mutual understanding or agreement, I held long ago that such connection was created by the Gandharva form of marriage Mr. B. Sitarama Rao, the learned vakil for the 3rd respondent suggested that the Ghandharva form of marriage was never legal for Sudras. I am unable to accept the suggestion. A reference to Manu, Chapter III, slokas 23 to 25

1. (1914) 27 M. L. J. 358. 2. (1913) 17 C. W. N. 442.

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would indicate that the Ghandharva and Asura forms were considered as the most proper forms of marriage for the servant class by the majority of the old lawyers though, speaking for himself, Manu would treat the Asura form as illegal even for Sudras and leave the Gandharva form alone as the approved form. If then "continuous concubinage is equivalent to marriage" among Sudras, it seems difficult to hold in strict logic that the son born of such a marriage is an illegitimate son. But my opinion that such a son is, according to the Shastras, an Aurasa legitimate son cannot now be sustained in a court of law in the face of the decisions which describe such a son as an illegitimate son. I therefore concur respectfully with the judgment of My Lord the Chief Justice just now pronounced that according to the preponderating weight of the case-law the son by a permanent concubine while he is an illegitimate son and not a legitimate son is entitled to get his appropriate share after the father's death provided the connection between his father and his mother was not incestuous or adulterous and that his said right is not subject to a further condition that a marriage could have taken place between father and the mother according to the custom of the caste to which the mother belonged. I respectfully dissent from the decision in *Annayan* v. *Chinnan* [1] which holds to the contrary. When the Legislature itself treats the marriage of all widows (including a Brahamin widow as lawful, it seems to me, rather difficult to hold that the permanent connection between a Sudra widow and a Sudra male is equivalent to an incestuous and adulterous connection because in the Sub-caste of the lady, re-marriage is not approved of by custom and to hold in consequence that the son born of such a connection is not entitled to a share. I am for the same reason not prepared to follow the decision in 15 I. C. 340 which goes even further than the decision in *Annayyan* v. *Chinnan* [1].

Mr. B. Sitarama Rao argued for imposing still another restriction that the mother must have been a virgin when she became the permanent concubine of the plaintiff's father. There is nothing in the Hindu Law texts to support that contention. The well known text of Manu that the *Pani-grahanika-mantras* can be pronounced only at the marriages of virgins has no relevancy in this connection as the recitation of Vedic Mantras were neither

1. (1909) I. L. R. 33 Mad. 366 s. c. 20 M. L. J. 355.

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necessary nor permitted in the conduct of marriages among Sudras.

The next question is whether the plaintiff's father was a Sudra and the plaintiff's mother also was a Sudra woman, it being not denied that their connection was neither adulterous nor incestuous. It seems not to have been contested in the Lower Courts, and it was not contested before us, that a Nattukottai Chetty belongs to the Sudra caste. No doubt, according to very learned Sanskrit scholars like Pandit A. Mahadeva Sastri and the late Dewan Bahadur Raghunatha Rao, a Nattukottai Chetty who belongs to a caste whose profession is not menial service but trading enterprise and money lending ought not to be called a Sudra. In fact, it sounds very grotesque now-a-days in the ears of many cultured Hindus to call that community Sudras and not Vaisyas. But as my learned brother Seshagiri Aiyar, J. said in *Muthukaruppa Pillay* v. *Sellathammal* [1], the Shastras cannot go against 'usage' and according to custom and the consciousness of the vast majority of the Hindus, Nattukotai Chetties are Sudras. Hence they must be considered to belong to the Sudra caste.

As regards the dancing girl caste, in Palani, Coimbatore and other places, they are usually known as belonging to the Kaikola Mudali caste. Of course, this Kaikola Mudali caste should not be confounded with the respectable caste of high class Mudaliars. But still Kaikola Mudalis are always recognised by usage as belonging to the Sudra caste and though many of the females of the caste take to the profession of the dancing girls, a respectable proportion are *Kulastris*. Other sub-sections of the dancing girl caste call themselves Kavarais (again not to be confounded with the high class Kavarais) and the Telegu dancing girls call themselves Sanis. Permanent concubinage of females belonging to these castes with males belonging to the several respectable sub-divisions of the Sudra caste is not very uncommon and the children of such unions after a few years (if the father is a very respectable and influential man) or after a few generations (if the descendants continue to lead respectable lives) are quietly incorporated into the father's respectable Sudra sub-caste, the progeny calling themselves Mudaliars, Naidus, Pillais and so on. Such an elevation to respectability is not at all opposed to the genius of the Hindu Social Polity. Manu says in Chapter X.

1. 16 M L. T. 587.

"Should the tribe sprung from a Brahman by a Sudra woman reproduce a succession of children by the marriages of its women with other Brahmans, the low tribe shall be raised to the highest in the seventh generation."

"As the son of a Sudra may thus attain the rank of a Brahman and as the son of a Brahman may sink to a level with Sudras, even so must it be with him who springs from a kshatriya, even so with him who was born of a Vaisya."

"He who was begotten by an exalted man on a base woman may, by his good acts, become respectable."

It is, however, said that these dancing girl *dasis* ought not to be classed as Sudras but as belonging to a fifth caste and reliance is placed upon the commentary of Vignaneswara (in the Mitakshara) on the 290th Verse of Yajnavalkya. Chapter XXIV in which the verse occurs relates to the subject of illicit intercourse with women and has nothing to do with the law relating to marriage or legitimacy or caste except in a very remote and indirect way. (Colebrooke did not translate the later portions of the Mitakshara beginning with Chapter IX of the Vyavahara Adhayaya of Yajnavalkya as they deal with those portions of the Hindu Law which need not and in many cases ought not to be applied by the British Courts of Justice). A free translation of this 290th Verse of Yajnavalkya is: "In the case of women who are the house-born servants of another or the kept mistresses of another, even though they are fit for intercourse" *i.e.* though there is no other objection to an intercourse with them) "the man who has had such an intercourse shall be fined ten panas." It is clear to my mind that Yajnavalkya when he uses the expression 'fit for intercourse' (*Gamya* in Sanskrit) means that the intercourse is not prohibited as adulterous or incestuous etc. But the Mitakshara proceeds to invent an objector who says that as every intercourse with even an unmarried woman is immoral whether she belongs to the same caste or a lower caste, or an *anuloma* caste or a *pratiloma* caste, intercourse can never be permissible, that is, the woman cannot be 'fit for intercourse'. Vijnaneswara answers by saying that punishment by legal tribunals does not exist in the case of prostitutes who are not under the guardianship of the father or other guardian or in the case of an unmarried woman, who though not a prostitute, is not the kept mistress or *Dasi* of one particular

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man. And he says that only a private *prayaschitham* for immorality is prescribed in such cases and not punishment (Danda) by the king and his tribunals. "For having intercourse with brutes or prostitutes, the prajapatya expiation is ordained" Then he says that though originally there were only four castes or *Varnas*, there have sprung up by the birth of illegitimate children among the castes, persons like *Kundas* and *golakas* and their descendants, a very numerous class born of illicit connections of women with men of their own caste or of superior castes. This shows that a prostitute by profession born in any of the four castes was called *Vesya.* Then he refers to the Skandapurana and to the fanciful story of ethereal nymphs or *Apsarasas* called *Panchachudas* and their progeny who lead the life of prostitutes (but prostitution only with *males of their own birth-caste or with people of superior caste*) and all these may be called a fifth caste. As far as I could understand the Mitakshara, the commentator does not intend to say that *Vesyas* are not human beings. He might have meant that prostitutes being the progeny of illicit connections in all *Varnas* may be fancifully styled to be the descendants of the *Apsarasas* called *Panchachudas*, for immediately afterwards he says that a *Vesya* might have lawful connection with a man of an equal or superior caste. It seems to be the same sort of allegorical description which says that the four castes were born from and even now form the limbs and organs of the *Prajapati Purusha.* It is well known that the original Skandapurana has been so much expanded by the addition of fanciful stories (including many recent *Sthala-mahatmyams*) that it is very difficult to say of any passage alleged to be found therein that it is undoubtedly genuine. I shall now say a few words on the value to be given to such passages when the community has not adopted the view enunciated in those passages. The Privy Council has declared that "under the Hindu system of the law, clear proof of usage will outweigh the written text of the law." In one recent case, the following passage occurs: "I would say, as a Judge who is bound to follow the authority of the Privy Council, that the rules of the commentators must be discarded, if opposed to custom." "Several instances might be cited to show that practices which were valid according to the ancient books are not legally valid now"—for example Niyoga. *Collector of Madura* v.

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Moothoo Ramalinga Sethupathy [1]. Mr. Justice Bashiyam Aiyangar was of opinion that the rule as to lameness being a bar to inheritance had become obsolete (See *Venkatasubba Rao* v. *Purushottam* [2]. The same learned Judge in *Karuppai Nachiar* v. *Sankaranarayanan Chetty, etc.* [3] said that, "this branch of the law relating to '*putrika-putra*' is now obsolete." So also it has been held that the rule as to impartibility of waters found in the Mitakshara has become obsolete. Again Abdur Rahim, J. in *Viswanathasawmy Naicker* v. *Kamu Ammal* [4] said "supposing for argument's sake that the Gandharva form of marriage would, according to the ancient texts, be permissible among the Sudras, I am of opinion that, so far as this caste is concerned, it must upon the evidence in the case be held to be obsolete and no longer recognised as valid. It has been strongly contended that if ancient Hindu law texts sanction this form of marriage we must hold that it is valid. But I am not inclined to accept that position. If I find that a certain caste among the Hindu has long given up this form of marriage and this is shown by their consistently adopting other more regular forms, I do not think that we are still obliged to recognise its validity in that caste." It is on account of such considerations that, as I said before, I felt obliged, sitting as a Judge, not to press my view that the son born of a permanent concubine to a Sudra is a legitimate son. On similar grounds I think that it is now difficult to hold that the dancing girl caste in the present day is not a sub-division of the Sudra caste, notwithstanding this fanciful story of the Skandapurana, used for a particular dialectical purpose by Vijnaneswara in connection with the question of punishment by the king for intercourse with a public prostitute. (Punishment by the king is *Danda*, while penance for the sin is *Prayaschitta* and the distinction is clearly made by Vijnaneswara). I respectfully adopt the opinion of Sankaran Nair, J., that all those Hindu castes which are not proved to be twice born must be treated as Sudras where it is admitted that they are not "untouchables." See *Muthusami Mudaliar* v. *Masilamani* [5]. Persons belonging to the dancing girls' caste are freely allowed into temples and Brahmin houses and being caste Hindus, not belonging to any of the three twice-born castes must, according to the clear consciousness of

1. (1868) 12 M.I.A. 397 at p.441. 2. (1902) I.L.R. 26 Mad. 133; s.c. 12 M.L J. 262.
3. (1903) I. L. R. 27 Mad. 300 at 311; s. c 13 M L. J 398.
4. (1912) 24 M.L.J. at p. 282. 5. (1909) I.L.R. 33 Mad. 342; s.c. 20 M.L.J. 49.

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the vast majority of the Hindu community be deemed to belong to the Sudra caste. Even if it be held that Mitakshara does intend to treat a particular class of prostitutes who claimed to be the progeny of *Apsarasas* (called *Panchachudas*) as not belonging to the Sudra caste, but to a 5th *Varna* there is nothing to show that the dancing girl caste to which the plaintiff's mother belonged was not derived from the Sudra caste but claimed to be descended from these *Apsarasas*.

Coming to the decision in Appeal No. 56 of 1908, quoted by the 3rd respondent's Vakil, that decision must be deemed to have proceeded on the facts of that particular case as pointed out by my learned brother, Ayling, J., in the Judgment just now delivered by him. I do not think that in a different case where slightly different (though similar) facts are established the same conclusion against the existence of the relationship of permanent concubinage is bound to be arrived at. A man who allows his permanent concubine to serve as a domestic servant for wages in a respectable household cannot, in my opinion, be held to have thereby destroyed the permanency of the connection between him and his said concubine any more than a husband who so allows his wife weakens the matrimonial relationship between himself and his wife.

In the result, I would answer the reference by saying that the plaintiff is entitled to a share in the joint family property left by his father.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Sir John Wallis, Chief Justice, Mr. Justice Sadasiva Aiyar and Mr. Justice Seshagiri Aiyar.

Soundararajam, minor by his mother and next friend Kannammal ... *Appellant* * (*Plaintiff*)

v.

T. R. M. A. R. R. Arunachalam Chetty (deceased) and others. ... *Respondents* (*Defendants.*)

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Hindu Law—Joint family—Partition—Unambiguous expression of intention by one member—Suing for partition—Effects a severance of joint family.

A member of a Mitakshara joint Hindu family becomes separated from the other members by the mere fact of suing them for partition *Suraj Narain* v. *Iqbal Narain* [1], followed.

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* A. No. 74 of 1911. 14th October 1915.

1. (1912) I. L. R. 35 A. 80 at p. 87.

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A member of a joint family who sells away his share in all the coparcenary properties becomes severed from the joint family and the alienee becomes a tenant-in-common with the other co-parceners in respect of the share so alienated.

Aiyyagari Venkataramayya v. *Aiyyagari Ramayya* [1], *Chinnu Pillai* v. *Kalimuthu Chetti* [2], *Doraisawmi* v. *Nondisawmy* [3], *Subba Rao* v. *Ananthanarayana Aiyar* [4] approved.

Nanjaya Mudali v. *Shanmuga Mudali* [5], *Ganesh Row* v. *Tulja Ram Row* [6], *Maharaja of Bobbili* v. *Venkataramanjulu Naidu* [7]. dissented from.

Appeal in *forma pauperis* against the decree of the Court of the Temporary Subordinate Judge of Ramnad at Madura in Original Suit No. 59 of 1910.

This Appeal came for hearing on Monday, the 19th day of July 1915, before the Chief Justice and Mr. Justice Seshagiri Aiyar, J. after the expression of the opinion of the Full Bench. [See p. 793 *supra*.

K. N. Aiya Aiyar, Vakil for the Appellant.

B. Sitarama Rao, Vakil for the 3rd Respondent.

The Court made the following

ORDER OF REFERENCE TO A FULL BENCH:—

This was a suit by a person alleging himself to be an illegitimate son of one Ramaswami Chettiar for partition against the legitimate son of his father. The Subordinate Judge held that the paternity of the plaintiff was not proved and dismissed the suit. On appeal, we came to the conclusion that the plaintiff was the son of Ramaswami Chettiar. On a reference to the Full Bench, it was decided that he is entitled to the share of an illegitimate son in his father's property. While the appeal was pending in this Court, the legitimate son died unmarried. His mother was brought on the record as his legal representative.

It is now contended for the appellant that he is entitled to the whole of the property of Ramaswami Chettiar by survivorship. The respondent's Vakil argues that by the presentation of the plaint for partition, the plaintiff became a divided member and that consequently he is not entitled to succeed to his legitimate brother by survivorship. He has also raised a preliminary objection on the ground that as the suit was framed for partition, it ought not to be converted into one for sole possession. We see no force in this latter contention. The claim of the plaintiff was to establish

1. (1902) I.L.R. 25 M. 690. 2. (1911) I.L.R. 35 M. 47 at p. 59; s c 21 M.L.J. 246.
3. (1911) 21 M. L. J. 1041. 4. (1912) 23 M. L. J. 64.
5. (1913) 26 M. L. J. 576. 6. (1913) 26 M. L. J. 460.
7. (1914) 27 M. L. J. 409.

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his status as an illegitimate son and to obtain a share in his father's property on that footing. The claim for partition is consequent on the declaration of status. The relief claiming sole possession is similarly consequential. This objection must be overruled. On the main question of survivorship, the observations of the Judicial Committee in *Suraj Narain* v. *Iqbal Narain*[1] are relied on by the respondent. Very recently Sankaran Nair, J. (in Appeal No. 119 of 1912) *Pothi Naicken* v. *Naganna Naicken*[2] held that these observations clearly mean "that it is open to a member of an undivided family governed by the Mitakshara Law to effect a separation between himself and the other members of the family by a declaration to that effect made to the other members." It is accordingly contended that the plaint in this suit which was served on the defendant was a declaration by the plaintiff of his intention to separate himself from his undivided brother, and effected a partition. This view is not consistent with the decisions of this Court in *Sudarsanam Maistri* v. *Narasimhulu Maistri*,[3] and *Thandayuthapani Kangiar* v. *Ragunatha Kangiar*,[4] or with the decisions of some of the other High Courts. Appeal No. 119 of 1912 is now the subject of a Letters Patent Appeal, but as the other learned Judge disposed of the case on other grounds, it may not be necessary to decide the point in that case, and as the question is one of great importance we have decided to refer it to a Full Bench. We, therefore, refer the question, "whether a member of a joint Hindu family becomes separated from the other members by the fact of suing them for partition."

A. Krishnaswami Aiyar (for *K. N. Ayah*) for the Appellant. I submit that a mere unilateral declaration of an intention to divide, on the part of a member of a joint Hindu family, not accepted by or acquiesced in by the other members, is not enough in law to effect a partition. The view I contend for, has the support of the texts of Hindu Law, has been uniformly recognised by the decisions, and is in harmony with the other branches of Hindu Law as interpreted by the Privy Council and the High Courts.

The Mitakshara defines partition in Ch. I, S. I. pl. 4: "Partition is the *adjustment* of diverse rights regarding the whole......".

1. (1912) I. L. R. 35 All. 80
2. 28 M. L. J. 423.
3. (1901) I. L. R. 25 M. 149 at p. 156.
4. (1911) I. L. R. 35 M. 239; s.c. 21 M. L. J. 243.

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[*Sadasiva Aiyar, J.*:—'*Settlement*' is more appropriate than '*adjustment*'.]

[*Wallis, C. J.*:—In short, it means division of common ownership into several ownership.]

It is clear that "a division of right in" the property must be the act of all the parties interested or of the Court. A unilateral declaration is ineffectual for the purpose. The Subodhini and Balambhatti, as well as the Viramitrodaya follow the Mitakshara and throw no further light on the question. The only text, which is supposed to support the contrary view is that of the Mayukha, Ch. IV. S. IV, pl. 2. In terms the text of the Mayukha refers to a case where there is no property to divide and provides that in such a case a mere declaration is enough.

[*Seshagiri Iyer, J*: The text is, "*Even* where there is a total failure of property. . . . ."]

[*Sadasiva Iyer, J*: '*Also* when there is a total failure of common property a partition may be made by a mere declaration.]

Nilakanta leans in favour of the Dayabhaga view, as pointed out by Mandlik in his Hindu Law, page 38.

[*Seshagiri Iyer, J*; Jimutavahana speaks of partition at the choice of a single co-parcener. See Dayabhaga Ch. I. pl. 35, and the Commentary of Sri Krishna.]

[*B. Sitarama Row* referred to the Saraswati Vilasa pl. 28.]

Saraswativilasa also draws a distinction between a case where the family owns property, and where the family does not. In the latter case, severance may be effected by a mere declaration of intention and not in the former. It is supposed by Sankaran Nair, J. in *Pothi Naiken* v. *Naganna Naicker* [1] that the Privy Council in *Pandit Suraj Narain* v. *Pandit Iqbal Narain* [2] adopted the view of the Calcutta High Court and laid down that a mere unilateral declaration is enough. I submit that the balance of authority in Calcutta is in my favour. The earliest case is *Bulakee Lal* v. *Mussamat Indurputtee Koer* [3] where the actual question was different and the observations as to the power of the family members to revoke an actual partition by unilateral declaration are obiter. *Mussamat Vato Koer* v. *Rowshun Singh* [4] merely purports to interpret *Appoovier* v. *Ramasubbien* [5]. In *Sadabart Pershad Sahoo* v. *Foolbash Koer* [6], Peacock, C. J., expressly lays down

1. (1915) 28 M.L.J. 423.
2. (1913) I.L.R. 35 A. 80.
3. (1865) 3 W. R. 41.
4. (1867) 8 W. R. 82.
5. (1866) 11 M. I. A. 75.
6. (1869) 12 W.R. (F. B.) 1 at 7.

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the proposition I contend for. The reason for the invalidity of an alienation by one member is stated to be the necessity for the concurrence of other wills for effecting a partition. The ratio decidendi of the decision is approved by the P. C., in 18 Calcutta.

[*Wallis, C. J.* Was this case cited before the Privy Council in *Pandit Suraj Narain* v. *Iqbal Narain* [1].]

No. In *Debi Pershad* v. *Phool Koeree* [2] it was held that the mere institution of a suit is not enough to effect a severance, though it is an unambiguous act on the part of a member. *Sadaburt Pershad Sahoo* v. *Lott Alikhan* [3] is a mere note of dissent from the earlier Full Bench case. [Reference was also made to *Joy Narain Giri* v. *Goluck Chunder Mytee* [4], *The Collector of Monghyr* v. *Hurdai Narain Sahu* [5] *Radha Churn Doss* v. *Kripa Sindhu Dass* [6] *Raghubanund Doss* v. *Sadhu Churn Doss* [7] *Tej Protap Singh* v. *Chamba Kalee Koer* [8]. *Bata Krishna Goswami* v. *Gopal Krishna Goswami* [9] *Bunwari Lal* v. *Daya Sunker Misser* [10].]

[*Seshagiri Iyer, J*: In Bengal, a membar of a Mitakshara joint Hindu family, cannot alienate his share in any item without the consent of the other members. In the case of a partition also such a consent would seem to be necessary.]

The Privy Council has uniformly held that partition must be by mutual agreement or consent. *Appoovier* v. *Ramasubbier* [11] *Ramchunder Datt* v. *Chunder Coomar Mundul* [12] *Chidambaram Chettiar* v. *Gauri Nachiar* [13].

[*Chief Justice.*—How do you explain the observation in *Chidambaram Chettiar* v. *Gauri Nachiar* [13], "the severance is effected by the decree if not earlier"? Does the expression "earlier" refer to the institution of the suit?]

No. An examination of the Privy Council Record in the case shows that the District Judge regarded the declaration of intention in the course of the plaintiff's examination concurred in by the other members as effecting a severance. The District Judge in express terms says that all that the Hindu Law requires to effect a severance is a concurrence of wills. It is to this that the expression "earlier" in the Privy Council Judgment relates.

1. (1912) I. L. R. 35 A. 80.
2. (1869) 12 W. R. 510.
3. (1870) 14 W. R. 339.
4. (1876) 25 W. R. 355.
5. (1879) I. L. R. 5 C. 425.
6. (1879) I. L. R. 5 C. 474.
7. (1878) I. L. R. 4 C. 425.
8. (1885) I L. R. 12 C. 96.
9. (1906) 5 C. L. J. 417.
10. (1909) 13 C. W. N. 815.
11. (1866) 11 M. I. A. 75.
12. (1869) 13 M. I. A. 181.
13. (1879) I L. R. 2 M. 83.

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[*Sadasiva Aiyar, J.*—In *Joy Narain Giri* v. *Girish Chunder* [1], the Privy Council give mesne profits from the day on which Joy Narain walked away from the family.]

That is because he was excluded entirely from participation in the joint family property and not because he became severed in status. Reference was also made to *Balkrishen Das* v. *Ram Narian Sahu* [2], *Ram Pershad Singh* v. *Lakhpati Koer* [3], *Parbati* v. *Naunhilal Singh* [4]. In the last mentioned case the whole discussion as to the factum and validity of the consent of the guardian would have been irrelevant if the other adult member could have effected a severance of his own accord.

[*Wallis, C. J.* :—The question in every case seems to have been, "did the members agree to divide?"]

In *Pandit Suraj Narain* v. *Iqbal Narain* [5], the Privy Council do not decide the point. They assume for the purposes of argument that a definite and unambiguous indication by one member of his intention to separate *may* amount to separation and find that the facts in that case did not require a decision on the question. The Privy Council purport to follow *Appoovier* v. *Ramasubbien* [6], and the cases subsequent thereto, and do not lay down any new proposition. The utmost effect that can be given to the observation of the Privy Council is that it is a casual dictum, not necessary for the purpose of the case.

The Madras cases also lay down that a severance of the joint family can only be by mutual agreement or by decree of court. The mere filing of a suit does not have that effect. *Sangili* v. *Mookan* [7] *Subbaraya Mudali* v. *Manika Mudali* [8] *Sudarsanam* v. *Narasimhalu* [9] *Thandayutha Pani* v. *Ragunatha Kangiar* [10] *Balakrishna Mudaliar* v. *Raja Mudaliar* [11]. Even in Bombay, where the Mayukha prevails the authorities are in my favour. *Moro Vishvanath* v. *Ganesh* [12] *Babaji Parasharam* v. *Kashibai* [13] *Murari Vithoji* v. *Mukund Shivaji Naick* [14].

Any other interpretation of the Privy Council decision will make it irreconcileable with the series of decisions both of Privy

1. (1878) I. L. R. 4 C. 434.
2. (1903) I. L. R. 30 C. 738 at 752.
3. (1902) I. L. R. 30 C. 231.
4. (1909) I. L. R. 31 A. 412, at 421.
5. (1912) I. L. R. 35 A. 80.
6. (1866) 11 M. I. A. 75.
7. (1892) I. L. R. 16 M. 350.
8. (1896) I. L. R. 19 M. 345.
9. (1901) I. L. R. 25 M. 149
10. (1911) I. L. R. 35 M. 239=21 M. L. J. 210.
11. (1915) M. W. N. 17.
12. (1873) 10 Bom. H. C. R. 444 at 464.
13. (1879) I. L. R. 4 B. 157.
14. (1890) I. L. R. 15 B. 201 at 205.

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Council and the High Courts, on allied branches of Hindu Law. *E.g.*,

1. Decisions which hold that the mere filing of a suit does not effect a division of status though nothing can be a more unambiguous declaration of an intention to sever. *Sangili* v. *Mookan* [1] *Subbaraya* v. *Manika Mudali* [2] *Bunwaree Lal* v. *Daya Sankar Misser* [3] *Babaji Parashram* v. *Kashi Bai* [4].

2. Even the alienation of a co-parcener's entire interest in the joint family property does not put an end to the joint family status though an alienation of that description is stronger evidence of an intention to sever than a bare declaration. *Nanjaya Mudali* v. *Shunmuga Mudali* [1] *Maharaja of Bobbili* v. *Venkataramanjulu* [2] *Madho Proshad* v. *Mehrban Singh* [3] *Balgobind* v. *Narain Lal* 4.

3. A person cannot will away his share in the joint property excepting with the consent of the other co-parceners and why is not a will an unambiguous declaration of an intention to sever? See *Brij Raj Singh* v. *Sheodan Singh* [5] *Lal Bahadur* v. *Kanhaiya Lal* [6]. The same remark applies to the case of gifts. The English Law, more than the Hindu Law, disfavours joint tenancies. Even in England a unilateral declaration is not sufficient to effect a severance. Halsbury's Laws of England Vol. 24, S. 204; Freeman on co-tenancy Ss. 30,31; *Patriche* v. *Powlet*[11] *In re Wilks : Child* v. *Bulmer*[12].

Lastly the inconvenience that will arise, if the opposite view is upheld, is greater. Take the case of a joint Hindu family. As soon as the eldest son of a member of a joint Hindu family attains majority, if he is to effect a severance by his unilateral act and walk away with his share, his brothers who are minors at the time, as well those that may be born thereafter, will be greatly prejudiced. It is for this reason that the texts prohibited partition among the sons during the life-time of the parents. See Manu Ch. ix, pl. 104; Mitakshara Ch. I. S. III, pl. 1,2. In no case has it been held that a co-parcener can put an end to the joint status by his unilateral act. The principle of *stare decisis* applies with special force to this case. For all these reasons I submit that the reference must be answered in the negative.

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1. (1892) I. L. R. 16 M. 350.
2. (1896) I. L. R. 19 M. 345.
3. (1909) 13 C. W. N. 815 at 824.
4. (1879) I. L. R. 4 B. 157.
5. (1913) 26 M. L. J. 576.
6. (1914) 27 M. L. J. 409.
7. (1890) I. L. R. 18C. 157.
8. (1893) I. L. R. 15 A. 339.
9. (1913) 25 M. L. J. 188 (P. C.)
10. (1906) L. R. 34 I. A. 65.
11. (1740) 2 Atkins 54=26 E. R. 430.
12. (1891) 3 Ch. 59.

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S. Srinivasa Ayangar and *Sitarama Row* for the Respondents. The texts of Hindu Law and the decision of the Privy Council conclude the matter. There is no text of Hindu Law which requires that partition in all cases must be by mutual agreement. The Mitakshara in Ch. I, S. I p. 4 merely gives a definition of partition or, rather states its effect. Manu Ch. IX, S. 104 merely lays down one mode of severance (*i.e.*,) by mutual agreement. The text of Manu is not exhaustive. See Viramitrodaya Ch II, pl. 5. A mere intention to divide creates a severance. Saraswati Vilasa pl. 28.

[*Seshagiri Iyar, J*: That refers to division of religious duties in the case of the indigent, who have nothing else to divide.]

In S. 28, the author lays down a general principle. Both in the case of religious duties and in the case of property, a mere intention to divide effects a severance. In the case of the poor, there can be a division of religious duties only. In the case of the wealthy, division of wealth must precede a division of religious duties. In either case a mere act of the will, on the part of one member is enough. S. 30 makes the meaning clear. The rule laid down in S. 28 is applied in S. 30 of the Saraswati Vilasa. Lastly there is the text of the Mayukha Ch. IV, S. iv, pl. 2. The footnote in p. 38 of Mandlik's Hindu Law is not an authority against me.

The *dicta* of the Privy Council in the cases cited by the other side are not against me. When the Privy Council in *Appoovier* v. *Ramasubbien* [1], lays down that an agreement may bring about a severance, it does not mean that there is no other mode of severance. In those cases the Privy Council do not purport to give an exhaustive enumeration of the means of effecting a division. There are various modes in which a disruption of the joint family can take place, besides mutual agreement, *e.g.*, renunciation, exclusion, conversion, unilateral declaration, alienation, award, decree of court, attachment of share, etc. A renunciation or release is a unilateral act and yet it severs the releasing member. The view laid down in *Sudarsanam Maistri* v. *Narasimhalu* [2], that consideration and consent of the other members are necessary for a release by one member is unsustainable. *Thangavelu Pillai* v. *Doraisamy Pillai* [3]. Alienation of a member's share in the family property effects a severance and makes

1. (1865) 11 M. I. A. 75. 2. (1901) I. L. R. 25 M. 149 at 156.
3. (1914) 27 M. L. J. 272.

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the alienee a tenant-in-common with the other members. *Ayyagari Venkataramayya* v. *Ayyagari Ramayya* [1], *Chinnu Pillai* v. *Kalimuthu Chetty* [2] *Subba Row* v. *Ananthanarayana Iyer* [3] and *Ram Chunder Dutt* v. *Chunder Coomar Mundul* [4]. For a case of exclusion see *Joy Narain Giri* v. *Girish Chunder Myti* [5]. Attachment effects a severance, *Suraj Bunsi Koer* v. *Sheo Prasad Singh* [6]. *Madho Parshad* v. *Mehrban Singh* [7]; so also conversion; see *Kulada Prasad Pandey* v. *Haripada Chatterjee* [8]. A father in a joint Hindu family, of his own accord without reference to his sons can effect a division among them. See Mitakshara Ch. I, S. 11 pl. 2. It is thus obvious that division by consent among the co-parceners is only one mode of effecting a severance. *Tej Protap Singh* v. *Champa Kalee Koer* [9] merely deals with two prominent modes of partition *viz.*, by agreement and by decree of Court and does not touch the present question.

There is nothing strange in an unilateral declaration operating to effect a division. Under the Mahomedan Law, such a declaration effects a dissolution of marriage. If a member wants to become separate, a declaration of his intention is enough, if communicated to others. There is nothing in principle to compel your Lordships to hold that such a person is bound to get the consent of the other members before relinquishing his claims against them, *quod* the family property. After all what is the consent worth ? Is it open to any member to defeat a partition suit by withholding his consent. In such a suit the court merely enforces for the plaintiff his strict legal right.

The authority of the early Calcutta cases and of the Privy Council case in *Pandit Suraj Narain* v. *Iqbal Narain* [10] concludes the matter. Mr. De Gruyther in his argument before the Privy Council refers to all the Calcutta cases laying down that a unilateral declaration is enough to effect a severance ; *Bulakee Lal* v. *Indurputtee Koer* [11], *Mussamat Vato Koer* v. *Rowshan Singh* [12], *Ram Dyan Kunwar* v. *Mt. Phoolbas Koer* [13], *Raghubanunda Doss* v. *Sadhuchuran Doss* [14], *Radhacharan Doss* v. *Kripasindhu Doss* [15].

1. (1902) I. L. R. 25 M. 690.
2. (1911) I.L.R. 35 M. 47=21 M.L.J. 246.
3. (1912) 23 M. L. J. 64.
4. (1869) 13 M. I. A. 181.
5. (1878) I. L. R. 4 C. 434.
6. (1879) I. L. R 5 C. 148.
7. (1890) I. L. R. 18 C. 157 P. C.
8. (1912) I. L. R 40 C. 407.
9. (1885) I. L. R. 12 C. 96
10. (1913) I. L. R. 35 A. 80.
11. (1865) 3 W. R. 41.
12. (1867) 8 W. R. 82.
13. (1870) 14 W. R. 346.
14. (1878) I. L. R. 4 C. 425.
15. (1879) I. L. R. 5 C. 474.

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The Privy Council accept the view laid down in these cases and enunciate the proposition. It is not a mere casual dictum as contended for by the other side but a considered enunciation of a principle of Hindu Law.

The decision in *Thandayuthapani* v. *Raghunatha* [1] is no longer good law. A plaint in a partition suit is enough to effect a severance. Mesne profits are calculated from the date of institution of the suit.

[*Seshagiri Iyer, J.*:—Is a communication of the declaration necessary and if so to whom?]

Communication to the Manager of the family is enough or if the Manager himself wants a partition, communication to all the other adult members is enough.

[*Sadasiva Aiyar, J.*:—In the case of a plaint in a partition suit, when is the severance effected.]

As soon as notice of the suit is served on the other side. For the sufficiency of a unilateral declaration, to effect a severance in status see Bhattacharya's Hindu Law p, 590; Sircar, Hindu Law p. 256. *In re Wilks*: *Child* v. *Bulmer* [2] supports my position. A man may by his own act preclude himself from claiming the right by survivorship. As soon as an order of court is passed, in a bill for partition the severance becomes complete. The principle of *staré decisis* does not apply for there has been no case in Madras till now, deciding the question. Equally inapplicable is the *argumentum ab inconvenienti* urged on the other side. No vested right is sought to be taken away; a new power will be conferred, if the reference is answered in the affirmative.

The Court expressed the following

Opinion:—*The Chief Justice*:—The arguments in favour of a negative answer to the reference have been very ably presented by Mr. A. Krishnasamy Ayyar; but after all it comes back to this, what is the effect to be given to the following passage in the judgment of their Lordships of the Judicial Committee in *Suraj Narain* v. *Iqbal Narain* [3]. "The principle applicable to cases of separation from the joint undivided family has been clearly enunciated by this Board in *Rewun Pershad* v. *Mussumat Radha Beeby* [4], and the well-known case of *Appoovier* v. *Rama Subba*

1. (1911) I. L. R. 35 M. 289. 2. (1891) 3 Ch. 59.
3. (1912) I.L.R. 35 A 80. (p. 87). s.c. 24 M.L.J. 845.
4. (1846) 4 M.I.A. 137.

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Aiyan [1]. What may amount to a separation or what conduct on the part of some of the members may lead to disruption of the joint undivided family and convert a joint tenancy into a tenancy-in-common must depend on the facts of each case. A definite and unambiguous indication by one member of intention to separate himself and to enjoy his share in severalty may amount to separation. But to have that effect the intention must be unequivocal and clearly expressed. In the present case that element appears to their Lordships to be wholly wanting."

It was argued that there was nothing in these two cases about separation by the unilateral act of the separating member; that as regards two later decisions which were referred to as supporting it the statement in *Ram Chunder Dutt* v. *Chunder Coomar Mundul*, [2] that the alienation of their shares by two members of a joint family terminated the joint status was *obiter*, as the litigation was between these alienees and the alienee from the other member of the family; and that the observation in *Chidambaram Chettiar* v. *Gauri Nachiar*, [3] about separation having been effected by decree or earlier referred, as appeared from the printed book, to the opinion expressed by the Trial Judge that separation might be held in that case to have taken place even before decree as the defendants had consented to it during the trial and there was then a concurrence of wills. Certain other cases were referred to in which it was said their Lordships had treated partition as effected by the decree. These cases, however, were cited before their Lordships in the course of the argument as well as the Calcutta cases which contain observations in favour of unilateral separation and the dissent from this view in *Aiyyagari Venkataramayya* v. *Aiyyagari Ramayya* [4]. In these circumstances I do not think that Courts in India would be justified in treating the statement in their Lordships' judgment that a definite and unambiguous indication by a member may amount to separation as intended to express no opinion one way or the other, but to leave the matter open as unnecessary to decide seeing that no such definite and unambiguous indication was proved in the case. I am therefore constrained to answer the question in the affirmative, though I do so with some reluctance, as the opposite view has, I think, prevailed in this Court and is more in harmony with decisions of this Court

1. (1866) 11 M. I. A. 75.
2. (1869) 13 M. I. A. 181 at p. 198.
3. (1879) I. L. R., 2 Mad. 83.
4. (1902) I. L. R. 25 M. 690.

on certain other questions which are dealt with in the judgment of my learned brothers.

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The Chief Justice.

None of the Privy Council decisions on this question proceed upon the authority of Hindu Texts, but, as the question has been argued from that standpoint, I may say that I do not think the texts to which we have been referred support the doctrine of partition by unilateral act. Vignaneswara says nothing about it in the Mitakshara. The passage which has been cited from the Sarasvati Vilasa begins with a complaint that the author of the Mitakshara had characteristically perhaps said nothing about division or separation as regards religious duties and merely endeavours to supply the omission. What the author says, if I rightly understand him, is this:—Separation in religious duties cannot take place without partition of wealth where wealth exists, pl. 29. What however if the family has no property to divide? He cites Vishnu for the proposition that there may be division of religious duties alone, but only, he explains, for those who have no wealth, pl. 28. In their case he says, pl. 30, "the separate performance of religious duties with or even without the others' consent constitutes a partition of religious duties; but in the case of those who have wealth partition of wealth takes place." The only partition he appears to contemplate in the case of those who have wealth is actual division and this of course involves consent. Mayuka S. 3 pl. 4 seems merely to reproduce in an abbreviated form the view of the Saraswati Vilasa as to partition when there is a total failure of common property. The comment in the Viramitrodaya C. 2 Pt. 1 pl. 5 that an actual assemblage of brothers is not necessary to effect a partition though it is mentioned in Manu IX, 104 does not I think affect this question. My answer is in the affirmative.

Sadasiva Aiyar, J.

Sadasiva Aiyar, J :—The question referred by the Division Bench to the Full Bench is whether a member of a joint Hindu family becomes separated from the other members by the fact of suing them for partition.

In Madras, it seems to have been generally assumed by the Bench and the Bar till the Privy Council decision in *Suraj Narain* v. *Iqbal Narain*, [1] that no separation of the plaintiff in status, which will affect what is loosely called the right of survivorship, takes place by the mere fact of the suit for partition

1. (1912) I. L. R., 35 All 80; s.c. 24 M. L. J. 345.

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and that it is only the decree of the Court passed in the suit which affects such status. In *Subbaraya Mudali* v. *Manika Mudali* [1] there is the following *obiter dictum*: "The right to continue a suit for partition after the death of the plaintiff would, of course, not devolve on his widow or other heir, not being a co-parcener of the defendant, because, immediately on the death happening before the decree, the right of survivorship would take effect." In *Sudarsanam Maistri* v. *Narasimhulu Maistri* [2] the following *obiter dictum* occurs at page 156. "Any such person" (that is a member of an undivided Hindu family) "may also retire therefrom" (that is from the membership in the undivided family) "by civil death or by renunciation on his part *acquiesced in by the remaining members*, provided such renunciation and acquiescence are manifested by an overt act—namely, 'the giving him 'some trifle' out of the family property." "With all deference to Garth, C. J., I find myself wholly unable to concur in the proposition enunciated by that learned Judge that a mere declaration by one member that he was separate from the others, would seem to be sufficient to effect the separation. *Radha Churn Doss* v. *Kripa Sindhu Doss* [3]". These seem to me to be the only *dicta* that *directly* negative the proposition that it is open to a member of an undivided Hindu family governed by the Mitakshara Law to effect separation between himself and the other members by an unequivocal and unambiguous declaration to that effect made in the plaint in a suit for partition brought by him, even after that declaration has been communicated to the other adult male members by the service of summonses in the suit. There are observations in numerous other judgments, not only of this High Court but of the other High Courts and of the Privy Council, that a partition of status is made by mutual consent or by decree of Court, but those observations cannot be safely relied on as implying that except in those two modes, partition of status cannot be effected and that *only* in those modes, it could be effected. It is well established that even without the consent of his sons who are his co-parceners, a father can effect a partition among his sons and between himself and his sons and it has been further held that without an express agreement to divide, partition in status is effected by conduct such as separate messing, separate contracting of debts, separate dealings with properties, mutual

1. (1896) I. L. R., 19 M. 345. 2. (1901) I. L. R., 25 M. 149.
3. (1879) I. L. R. 5 C. 474 at 477.

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dealings on the footing of separate interest and so on. (See *Gadian Chettiar* v. *Gadian Chettiar* [1] and *Mussamut Josoda Koonwur* v. *Gourie Byjnath Sahae Sing* [2]. As I have said already, even the direct pronouncements in *Subbaraya Mudali* v. *Manicka Mudali* [3] and *Sudarsanam Maistri* v. *Narasimhulu* [4] are *obiter*.

In several cases in the Calcutta High Court, on the other hand, cases falling under the Mitakshara Law, there are *dicta* (though again, mostly if not wholly *obiter dicta*) that an unequivocal declaration by one member with or to the knowledge of the other members does effect a division in status. (See *BulakeeLall* v. *Mussamut Indurputtee Kowar* [5], *Mussamut Josoda Koonwur* v. *Gourie Byjnath Sohae Singh*, [6] *Mussamut Vato Koer* v. *Rowshun Singh* [7] *Debee Pershad* v. *Phool Koeree alias Gheena Koereee* [8] *Mussamut Phoolbas Kooer* v. *Lall Juggessur Sahi* [9] and *Raghubanund Doss* v. *Sadhu Churn Doss* [10].

I do not think it necessary to refer to the other numerous cases decided by our High Court and the other High Courts quoted before us *as they do not contain any dicta directly dealing with the proposition for which the defendant contends in this case,* namely, that an unequivocal declaration does create a division of status. These other cases deal (1) with the effect of an alienation attempted to be made *by will* of his undivided share in the whole or in one or more of the coparcenery properties or the alienation of the entire ownership in one or more of such properties by a member of the coparcenery or (2) with the effect of gifts *intervivos* so attempted to be made or (3) with the effect of alienations intervivos *for value* so made. The observations found scattered in such cases were relied on for the purpose of showing that as the logical result from those observations, there followed either the affirmative or the negative of the above proposition for which the defence contends in the case before us. The development of law is not always logical and the development of the Hindu Law in connection with the legal effect of alienations by a member of a coparcenery, cannot be proved, in my opinion, to be strictly logical even by the employment of the highest ingenuity and learning and I, of course, shall

1. (1914) I. L. W. 799.
2. (1866) 6 W.R. 139 at p. 140 to 144.
3. (1896) I. L. R. 19 M. 315.
4. (1901) I. L. R. 25 M. 149 ; s.c. 11 M. L. J. 253
5. (1865) 3 W. R. 41.
6. (1866) 6 W. R. 139.
7. (1867) 8 W. R. 82.
8. (1869) 12 W. R. 510.
9. (1870) 14 W. R. 340.
10. (1878) 4 C. 425 at p. 430.

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not attempt to do so. Similar observations apply to the law relating to the son's liability for the father's debts, the law relating to alienations for discharging such debts, the law relating to the rights of alienees from the incumbent of an Impartible Zemindary, the law relating to succession to such Zemindaries and to many other branches of Hindu Law. In *Chinnu Pillai* v. *Kalimuthu Chetti* [1] in the opinion of the Honourable Mr. Krishnasami Aiyar printed at page 59, the following occurs:—"But it does not follow from this that if a co-parcener alienates his interest in family property, the alienee has, until actual partition, no definite share in the property. Like the alienee from a joint tenant in England, *the alienee from a co-parcener in India has a fixed share in the common property with reference to the date of alienation.*" This implies that the alienor who sells away his share in *all the coparcenery properties* becomes severed from the joint family and the alienee becomes a tenant-in-common which the other co-parceners in respect of the share so alienated. (See also the decision in *Aiyyagari Venkataramayya* v. *Aiyyagari Ramayya*, [2], the judgment of Sundara Aiyar J. in *Dorasawmi* v. *Nondisawmy*, [3] and the decision of Benson and Sundara Aiyar, JJ. in *Subba Row* v. *Ananthanarayana Aiyar* [4]). I respectfully agree with the above opinions and respectfully dissent from the decisions which have held that the alienor coparcener continues to be a member of the undivided Hindu family (and is hence entitled to the accretions to his share caused by the subsequent death of co-parceners dying without leaving male issue) and from the decisions which hold that the alienee from a co-parcener does not get any rights in or title to the share of the alienor but only an "equity" to be worked out, in a partition suit. (Some of the decisions I so respectfully dissent from are found in *Nanjaya Mudali* v. *Shanmuga Mudali* [5] *Ganesh Row* v. *Tulja Ram Row*, [6] and *Maharaja of Bobbili* v. *Venkataramanjulu Naidu* [7].

Before proceeding further, I shall first consider the question whether the filing of a suit for partition is, in the language of the Privy Council, "a definite and unambiguous indication by one member of his intention to separate himself and to enjoy his share in

1. (1911) I. L. R. 35 M. 47
2. (1902) I. L. R., 25 M. 690
3. (1911) 21 M. L. J. 1049
4. (1912) 23 M. L. J. 64
5. (1913) 26 M. L. J, 576=15 M. L. T. 186.
6. (1913) 25 M. L. J. 455.
7. (1914) 27 M. L. J. 409.

individuality" and whether such intention is made "unequivocal" by the filing of the plaint and becomes "clearly expressed" to the other co-parceners by the summonses served on them in the suit. It seems to me that if the plaint is filed, not merely for a declaration of the plaintiff's right as a co-parcener in an undivided family (as in the old Calcutta case referred to in 12 weekly Reporter 510), but is brought for a partition of the joint family property on the basis that the plaintiff wishes to be treated as a divided co-parcener from the date of the plaint (if not from an earlier date) and if he seeks for mesne profits at least from the date of the plaint, if not from an earlier date, and asks for the division of the properties as they stood at the date of the plaint, if not at an earlier date, it seems to me difficult to conceive of a stronger, more unequivocal and more unambiguous declaration of an intention to separate himself and if that intention is communicated through the Court by summonses issued to the defendants (the remaining co-parceners) in that case, such clear expression of intention becomes fully effectual to create division in status. I take it that the phrase "clearly expresses" means "clearly expressed to the definite knowledge of the other co-parceners."

I shall now proceed to consider the Hindu Law Texts on this point. Manu in Chapter 9, Sloka 111 seems to treat separation in living and messing as a very laudable act as it multiplies religious acts and hence a mere desire to live apart and the consequent living apart among brothers as effecting separation in interest so as to put an end to the right of the eldest brother to manage the whole patrimony. Saraswathi Vilasa deals in placita 22 to 33 with the question of what constitutes division of status. In placitum 29 it lays down the rule that, in the case of brothers who have wealth, partition of religious duties should be made only after the partition of wealth. In placitum 28, it lays down another general rule that "partition can be effected by mere intention, just as the making of an appointed daughter can be effected by mere intention without any formality." It seems to me clear that in this placitum the word, 'partition', *does not exclude* partition of wealth and is not confined to partition of religious duties as argued by Mr. A. Krishnasawmi Aiyar for the appellant. Placitum 30 is as follows:—"Therefore also in the case of those who have no wealth, the separate performance of religious duties with or even without others' consent

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constitutes a partition of religious duties; but in the case of the rich, partition of wealth takes place". It seems to me that the phrase "with or even without others' consent" is introduced so as to show the applicability of the general rule laid down in placitum 28 that mere intention without the other co-parceners' consent does effect a division and not to introduce any qualification that, as regards partition of wealth, others' consent is necessary. The distinction made is not, between the creation of a division in status with or without others' consent in the case of religious duties and the creation of a division in status with others' consent in the case of partition of wealth, but between the creation of a division in status in the case of those who have no wealth effected by a separate performance of religious duties alone with or without consent and the creation of a division in status by a separation of interest in wealth only with or without consent in the case of those who have wealth, because a separate performance of religious duties alone in the case of co-parceners who have wealth is not sufficient to effect division in status.

In placitum 33, the Saraswathi Vilasa declares that not only Manu and Yajnavalkya but every Smrithi and every commentator and the Nibandha Kara without exception favour division in status, thus showing that the true Hindu Law does not favour the doctrine of joint status, though customs borrowed from the Malabar Marumakkathayam system or other sources might have gradually encroached upon the Shastraic Law originally followed.

Again even in the case of those who have wealth, a co-parcener who has not effected division in status by getting his share of the wealth or by a clear intention expressed to his other co-parceners can by conduct continued for a number of years be deemed to have expressed that intention, that conduct being the separate performance of religious ceremonies for 10 years. This is provided for by placitum 34. Placitum 34 cannot apply to those who have no wealth as the separate performance of religious duties in their case without any condition as to the length of the period at once severs the interests. In fact, placitum 34 says that those separately performing religious duties for 10 years "should be *understood as divided in respect of the paternal wealth*," that is, even without actual division or declaration of intention to divide. The 10 years' period is, of course, only a rule of evidence under the old Hindu Law which is not now binding on the Courts which are governed by the Evidence Act.

In the Viramitrodaya, placitum 4 of Chapter II says at the end that even while the mother is living (after the father's death) the sons have no right to the parental wealth as they ought to be dependent on the mother for their support and maintenance. Then placitum 5 clearly states that the status of division is created at the desire of a single co-parcener and hence a meeting of the brothers in order to arrive at a consensus in respect of divided status is not necessary.

In Vyavahara Mayukha, Section 3, placitum 2, it is said "Also when there is a total failure of common property, a division in status may even then be made, by the mere declaration, 'I am separate from thee'; for, a partition merely indicates a state of the mind. Transactions relating to partition are only declaratory of this mental state". I am unable to accept the far-fetched gloss of Mr. A. Krishnaswami Aiyar on the last two sentences that they relate only to those who have no secular wealth to divide nor can I accept the still more far-fetched comment of Mr. Mandlik that the Bombay author of the Vyavahara Mayukha was influenced by the Bengalee commentator Jimuta Vahana.

If a co-parcener can demand partition and separation of his share at any time and if the other co-parceners are legally bound to give him his share at once, it seems to me clear that separation in interest takes place as soon as he expresses an unequivocal intention to that effect or makes an unequivocal demand for partition and that the necessary delay in ascertaining the particular property which falls to his share either by agreement or by an award of Panchayats or by a decision of the Court cannot delay the separation in status. As it is put in *Joy Narain Giri* v. *Girish Chunder Maiti* [1], "this separation of status by declaration and communication of intention has its origin in the power of each member of a family to demand a partition at any moment and *the inability of the family to retain any member in joint ownership longer than he may desire.*" The managing member of an undivided Hindu family cannot surely represent a junior member after the latter refused to remain a member of the undivided Hindu family and demanded his share, except, of course, in respect of dealings with third persons to whom notice had not been given of the said junior member's intention to terminate the agency of the managing member. If, as was argued, the English

1. (1878) I. L. R. 4 C. 425 at page 430.

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Law of joint tenancy does not allow a joint tenant by a mere unilateral declaration to make the joint tenancy a tenancy-in-common so as to defeat the right of survivorship (*See per* Lord Hardwicke in *Partriche* v. *Powlet* [1], quoted in *In re Wilks* : *Child* v. *Bulmer* [2], and the opinions of Lord Thurlow and Lord Hatherly given at page 63,) that rule of the English Law has, in my opinion, no relevancy in the decision of the question of Hindu Law whether a co-parcener of a joint undivided Hindu family can put an end to his status as undivided co-parcener by such declaration. Even in English Law, joint tenancy with the right of survivorship was never favoured by Courts of Equity and the increasing tendency has been to take advantage of slight indications to convert a joint tenancy to a tenancy-in-common. Alienation by a joint tenant of his share to a third party severs the joint tenancy in English Law. In *Narayanasami Naidu Garu* v. *Tirumalasetii Subbaya* [3], I said "I am of opinon that Courts should lean against the continuance of joint tenancies and against claims of survivorship." See page 100. "The ancient Hindu Law knew, according to the learned writer Mr. J. C. Ghose, no such principle as joint tenancy and no principle of survivorship.........Equity also does not favour joint tenancies and rights of survivorship." I know it has been said that the Mitakshara recognised the principle of survivorship and joint tenancy and I myself have, following the language used by the highest authorities, stated so. The Mitakshara first created a revolution (it may be that it sanctioned by its authority or recognised the revolution already being effected by the then prevailing customs) by giving the sons rights by birth jointly with the father in ancestral properties, taking advantage of the moral admonitions addressed in ancient texts to the father not to alienate his ancestral properties so as to leave his children penniless. Then the right of the widow of a sonless co-parcener to inherit her huband's share was denied to her and the other male co-parceners were made the inheritors of that share. The whole of Chapter II, Section I, placita 1 to 39 of the Mitakshara which contains the ingenious special pleading by which the widow of an undivided sonless co-parcener was disqualified from inheriting his share in the estate does not contain a word about survivorship. Vijnaneswara professes to find equally authoritative texts for either view *as to the rule of inheritance,*

1. (1790) 2 Atk. 54. 2. (1891) 3 Ch. 59 at page 62.
3. (1913) M. W. N. 96.

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some texts recognising the right of the widow and some excluding her on the ground of incapacity to perform religious ceremonies and he then professes to reconcile the texts by saying, *not that any principle of survivorship prevents the inheritance of the widow* but that the succession itself to the undivided share of the deceased co-parcener passes to the remaining co-parceners. This idea of a distinction between accretion by survivorship and the passing of property by inheritance or succession proper seems absolutely foreign to Hindu Law. I cannot but believe that because the other co-parceners were to inherit the deceased sonless co-parcener's share under the Mitakshara instead of the proper female heir under the old texts, (namely, the widow or the daughter if the widow had died) inheriting it, a confusion of ideas based upon the notion of English Law that the surviving joint, tenants get the deceased tenant's share by survivorship was introduced into the consideration of cases under the Hindu Law. That there are numerous differences between the joint tenancy of the co-parceners in a Mitakshara Hindu family and the joint tenancy as understood in English Law has been recognised in several cases. As Sankaran Nair, J. says in his judgment in Appeal No. 119 of 1912; "It is argued that the joint tenancy has been converted into tenancy-in-common. The differences between the joint tenancy of a Hindu family and as it is understood in English Law must be borne in mind. In the former the joint tenancy has its origin in birth and not by conveyance. There is no unity of possession, the managing member being alone entitled to it against the others. There is no unity of title as the members do not derive their interest at the same time. There is no unity of time as they do not hold for the same time and from the same time. There is no unity of interest as some may be entitled to larger share than others. The chief characteristic of survivorship does not exist as a co-parcener's interest devolves, not on all the others but only on his sons, if any. A co-parcener's interest again is liable to diminution unlike the interest of a joint tenant in English law". In the well known case, *Appovier* v. *Rama Subba Aiyan*, [1], Lord Westbury no doubt said:—"Thus the joint tenancy is severed, and converted into a tenancy-in common". But he carefully added the qualifying clause "using the language of the English Law *merely by way of illustration.*"

1. (1866) 11 M. I. A. 75 at p. 92.

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I cannot, however, help thinking (as I said before) that notwithstanding this qualifying phrase, the idea of a right by survivorship in the remaining co-parceners instead of a right by succession which is the right known to Hindu Law has coloured the language of almost all the subsequent decisions. It seems to me therefore with the greatest respect that if a mere alienation by a co-parcener even under the English Law severs the joint tenancy so as to prevent the right of survivorship, to hold that under the Hindu Law (which knows no such principle as the principle of survivorship and into which the principle of survivorship was introduced by a side wind as a synonym for the right of succession of undivided co-parceners to the share of a deceased co-parcener) an alienation by one of the co-parceners even of his entire interest does not sever the joint tenancy seems to me inadmissible. I should, in this connection, like to fortify my opinion as to the true Hindu Law by the following quotation from the Tagore Law Lectures of a very learned Hindu Lawyer Mr. Bhattacharyya. He says (pages 53 to 55) "Now, we shall see that the members of an undivided Hindu family stand very much in the same relation to one another as joint tenants under the English law do. Each member has possession over the whole of the joint family property, and if one member dies, his right devolves upon the rest under certain limitations. Thus we shall see that in a true joint family, that is, in a joint family governed by the Mitakshara Law, the widow of a deceased member does not succeed her husband to his rights, but the whole joint property remains as before subject to the title and possession of his undivided co-parceners, in a case in which the deceased member had no lineal descendant to take his place. This is the feature of a joint family governed by the Mitakshara Law which strikes every student of Hindu Law of Succession as the most distinctive. I have no doubt that it was this peculiar feature, which at once suggested to the minds of the early British administrators of Hindu Law, the close resemblance between the joint tenants under the English Law and the joint Hindu family under the Mitakshara Law. This is called the right of survivorship—a term unknown to the original texts; nor do we know, nor can we pitch upon, any expression in Sanskrit which would convey the idea. This is not to be wondered at; for the original texts do not treat much of the law relating to undivided families; the sayings of the ancient sages, such as Manu and

Yajnavalkya, directly making mention of undivided co-parceners are few; nor have the later authors, such as Vijnaneswara and Vachaspati Misra, dwelt at length upon the subject. We have at present a goodly mass of legal maxims which lay down the rights, the liabilities, the status, the obligation and the duties of the members of a joint Hindu family; but those maxims are to be gathered from the case-law as it has been developed by the British administrators of justice for the people of India. It consists of a number of deductions gradually made from the few principles to be obtained, generally in the Mitakshara, and sometimes also in other authorities. The number of such authorities is not very large."...'But be that as it may, the doctrine of survivorship, which was never put into a form or words by any writer of original texts of Hindu Law, from the Mitakshara downward, has yet proved a powerful engine in the development of the case—law on the subject of Hindu joint families. As soon as it was observed that there was a very tangible analogy between Hindu co-parceners and English joint tenants, it was inevitable that incidents of English joint tenancy should have been extended to the legal position of the Hindu co-parceners, at least in cases where such extension did not run counter to anything to be found in the original texts. We must remember that the judges who did this, had no other course left open to them; for they were familar with the law of the English joint tenancy; they saw nothing in the original texts, or in the translations, to guide them in the particular instances; certainly the most reasonable course for them was, avowedly or not, to take advantage of that other law they were familiar with, supported as this course was by the analogy already adverted to."

I shall now pass on to consider the two Privy Council decisions which seem to me to be almost conclusive on the question. In *Ram Chunder Dutt* v. *Chunder Coomar Mundal*[1] their Lordships say: "It is true that the status of the family as a joint Hindu family was not continuing. *The alienation of the shares of two members of that family to the Munduls determined that status, and substituted the status of the co-sharers of joint owners,* whose rights, as is shown by Lord Westbury in the case of *Appovier* v. *Rama Subba Aiyan*[2] are in many important respects distinguishable from those of a joint and undivided family." I think this is a clear and

1. (1867) 13 M. I. A. 181 at p. 198. 2. (1866) 11 M. I. A. 75.

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unambiguous authority for the proposition that an alienation by a co-parcener does effect a severance of the joint status of the family so as to prevent the right of survivorship. In the latest case in *Pandit Suraj Narain* v. *Pandit Iqbal Narain* [1] their Lordships say "What may amount to a separation or *what conduct on the part of some of the members* may lead to disruption of the joint undivided family and convert a joint tenancy into a tenancy-in-common must depend on the facts of each case. A definite and unambiguous indication by one member of intention to separate himself and to enjoy his share in severalty may amount to separation. But to have that effect the intention must be unequivocal and clearly expressed. In the present case that element appears to their Lordships wholly wanting." I think these sentences clearly indicate that the conduct on the part of *some members alone* without the consent of other members may lead to disruption and convert the joint tenancy into a tenancy-in-common and that the definite and unambiguous indication of intention by one member if unequivocal and clearly expressed can amount to separation. After full consideration, I am wholly unable to accept the argument of Mr. A. Krishnaswami Aiyar for the appellant, (based on an undue emphasis on the word "may",) that their Lordships only intended to assume for the purpose of argument that a definite and unambiguous intention unequivocally and clearly expressed may amount to separation and that they did not intend to decide that it would amount to separation. That even an attachment of a co-parcener's share by a simple money-decree-holder will prevent survivorship has been decided in numerous cases. (See *Muthusami Chetty* v. *Chinnammal*[2] and *Thadi Ramamurthi* v. *Moola Kamiah* [3]. Unless the joint tenancy becomes severed and converted into a tenancy-in-common, by the attachment and seizure of the share of the co-parcener, I think it is difficult to find a tenable basis for such decisions, mere vague references to the equities of creditors and of alienees for value not creating in my mind any nexus between the attachment or alienation on the one hand and the extinction of the right of survivorship on the other. Mr. A. Krishnaswami Aiyar argued that if an unilateral declaration by a co-parcener deliberately and clearly expressed to others, severs the so-called joint tenancy, it will lead to several practical inconveniences. I do not feel much

1. (1912) I. L. R., 35 All., 80 at page 87. 2. (1914) 26 M. L. J. 517.
3. (1914) 16 M. L. T. 123.

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impressed by this argument. The older and purer Hindu Law was altered by the Mitakshara so as to prevent widows from inheriting their husband's share and it is now almost a truism with careful students of the Shastras that the older and purer sources of Hindu Law are more in consonance with the needs of a progressing and progressive society than the rules introduced by the glosses of medieval commentators on those texts (the glosses very often being far-fetched and even distorting the texts). Such new rules were made according to the temporary exigencies of the times and places, a commentator belonging to one part of India or to one period of its history differing from a commentator on the same text in another part or in another period. The consequent degradation of the Hindu Law by the medieval commentators which led to the doctrine of rights by birth in sons (instead of merely moral claim by birth) the doctrine of the right of a son to question alienations by his father and to the exclusion from inheritance of most female heirs except under exceptional circumstances is being gradually got rid of through the development of the law by the several decisions of the Privy Council and the older and purer Hindu Law is being gradually brought back. The power of the father to alienate for antecedent debts and the power of the father's creditor to pursue his remedy against the whole property for the father's debts have been now established so as to restore *earlier* purer Hindu Law. The decisions of the Privy Council therefore which tend to defeat the artificially introduced right of survivorship (introduced not even by Hindu commentators and introduced in comparatively modern times) so as to restore the purer Hindu Law which allowed inheritance by widows and other female heirs to a deceased co-parcener's share should not, in my opinion, be attempted to be evaded by arguments involving too fine distinctions. As G. Sirkar Sastri says in his Hindu Law page 239 at page 240, the doctrine of the Hindu Law is that "partition must take place by the desire of the single member, and the others are bound to consent and agree to it. Therefore, the declaration by a member of his desire for partition to the other members, accompained or followed by conduct evidencing its earnestness, must be sufficient to cause the severance of his interests. That is all that he can do: if the others do not agree, but obstruct his desire, and compel him to continue to live with them for some time as before, they cannot be permitted by both law and equity to prejudice his right, and to

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gain an advantage by their such wrongful omission. He should thenceforward be deemed to live with them in the same manner as a member of a joint family governed by the Dayabhaga, that is to say, as a tenant-in-common and no longer as a joint tenant."

As regards the danger of perjured oral evidence about such declarations and intentions, not only have their Lordships of the Privy Council taken care to lay down in *Suraj Narain* v. *Iqbal Narain*, [1] that such intentions must be proved by cogent and clear evidence but there is the Legislature which could by enacting registered documents as necessary to evidence such declarations, obviate that inconvenience. Piece-meal legislation is no doubt not desirable but so long as the generality of the followers of Hindu Law, even in the same province are not willing to have it ascertained by a commission and codified according to the recommendations of that commission, piece-meal legislation is the only course open to the Legislature.

In the result, I would give the following answer to the reference, namely, that a member of a joint Hindu family becomes separated from the other members by the fact of suing them for partition and by the unequivocal declaration made in the plaint in that suit when such unequivocal declaration has been clearly expressed to the other co-parcener or co-parceners through the Court or otherwise.

Seshagiri Aiyar, J.

Seshagiri Aiyar, J.:—If the question were not concluded by the latest decision of the Privy Council in *Suraj Narain* v. *Iqbal Narain* [1], I would have answered the reference in favour of the appellant. I feel with the learned Chief Justice that it is not competent for us to explain away the decision of their Lordships of the Judicial Committee as suggested by Mr. Krishnaswami Aiyar. The Judicial Commissioner quoted the early Calcutta decisions in his judgment and in the argument before the Privy Council reference was made to some of them. Mr. Krishnaswami Aiyar contended that their Lordships should not be understood as overruling the current of decisions in Madras without even adverting to them. But the question did arise for decision and there was a pronouncement. Their Lordships alone can explain away their judgment, if they did not really intend to decide the question. I, therefore, hold that the question referred to us is concluded by the authority of the Judicial Committee. However

1. (1912) I. L. R. 35 All. 80.

as I feel that the texts of Hindu Law and the authorities in Madras and elsewhere are in favour of the contention of the appellant, I feel bound to state my views at some length on the points raised before us. The question under reference has been argued with great ability on both sides.

In my opinion the weight of textual authority is in favour of the appellant's contention. The definition of *Vibhaga* in the Mitakshara gives no indication regarding the mode of effecting a partition. The Saraswati Vilasa had been claimed by both the learned Vakils for their contentions. The chapter commencing with the twenty-second sloka is headed "what is partition". The author quotes *Baruchi* for the position that *Vibhaga* is the division of wealth and of religious duties. He then points out that the definition of Vignaneswara is not comprehensive enough to include the division of religious duties, and proceeds in slokas 25 to 27 to deal with the spiritual merits of performing separate religious duties. The conclusion on this sub-head is stated in sloka 28, thus: "From this it is known that without any formality, partition can be effected by mere intention, just as the making of an appointed daughter can be effected by mere intention without any formality". The next topic deals with persons who have wealth to divide. The author says that in such cases partition of wealth must precede the partition of religious duties. In sloka 30, the requisites of the two classes of divisions are stated, as a result of the previous discussion: "Therefore also in the case of those who have no wealth, the separate performance of religious duties *with or even without other's consent* constitutes a partition of religious duties; but in the case of the rich, partition of wealth takes place". As pointed out by the learned Chief Justice in the course of the argument, the last clause seems to refer to an actual division of the properties. I feel no hesitation in holding that the introduction of clause "with or even without others' consent" was intended to point out the distinction between the two classes of cases. Having regard to the doubts expressed by Mr. Justice Sadasiva Aiyar during the course of the argument, I examined the Sanskrit verses with some care, and I am clear that in the case of the partition of wealth, the consent of the co-owners is essential. I may also refer to verse 34 which pointedly brings out the difference: "Here the separate preformance of religious duties alone of one's own will without consent of others for a period of ten years constitutes

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partition." This sentence would be meaningless if the contention of Mr. Srinivasa Aiyangar is to be accepted. The various slokas to which I have referred show that the author was conscious that in matters which affected the wealth of all the co-owners, their consent must be taken, but where the religious merit is the object aimed at as in the case of the division of religious duties only, the consent of the others is unnecessary.

Mr. Srinivasa Aiyangar relied upon placitum 5, Chapter II of Viramitrodaya, another authority accepted in Southern India. The author is there considering whether the statement of Manu that the brothers should "assemble together" is mandatory or only directory. His opinion is that it is not a rule of law, because the word *assembly* will not be apt to describe the meeting of only two brothers. His another reason is "otherwise partition could not take place at the desire of the co-parcener". This statement, it is argued, declares that in *all cases* partition can take place at the desire of one of the members. What the author meant to say was that there are instances in which partition can be effected at the desire of one of the members: for example, the separate performance of religious duties; and consequently Manu should not be held to have enjoined that whenever partition takes place, the brethren should assemble. I do not think that Viramitrodaya helps the solution of the problem one way or the other.

We have then, the Vyavahara Mayuka which is somewhat enigmatical. The author does not discuss the mode of partitioning wealth. In Section III placitum 1, he quotes *Narada* for the definition of partition and abruptly says in placitum 2 "Even when there is a total failure of common property, a partition may also then be made by the mere declaration 'I am separate from thee'; for, a partition merely indicates a state of the mind. Transactions relating to partition are only declaratory of this mental state." It may be as suggested by the learned vakil for the appellant that the author was only dealing with religious duties; or it may be as pointed out by Mr. Mandlik in his Hindu Law that the author was influenced by Jimuta Vahana's opinion. It is worthy of note that in the province where this treatise is the paramount authority, there is no decided case which accepts the view that partition of property can be effected by a bare declaration on the part of one of the co-owners.

Jimuta Vahana is explicit. His view proceeds on the theory that

there is no survivorship in a joint family. "Since any one parcener is proprietor of his own wealth" sums up the distinction between the two schools of law. I do not propose to embark upon the speculation whether Yajnavalkya and his commentator really laid down that there is survivorship or joint tenancy in a joint family. It is enough to say that the essential characteristics of Hindu Law as understood by the writers of the Benares School are *survivorship and representation*. So far as a cursory examination of these treatises goes, the idea of survivorship is in entire consonance with the genius of Hindu Law as it is administered in Southern India. The case of the Numbudri Brahmins who follow Makkathayam Law and the incidents of tarwad ownership among Nairs show that the principle of survivorship has taken deep root in Southern India. That is not the position of those to whom the Dayabhaga applies. It is therefore perfectly clear that Jimuta Vahana's view is inapplicable to the Mitakshara system. Moreover students of Hindu Law must have noticed how laboriously Jimuta Vahana has endeavoured to differ from Vignaneswara whenever possible. On an examination of textual law my conclusion is that in the Benares School, a mere declaration of intention will not effect a partition among co-owners.

Now I go to decided cases. Naturally the Calcutta cases come in for examination first, as it is in them we meet with the pronouncement that a mere declaration will suffice to effect a division of status. Before dealing with them individually, I wish to make one observation without meaning the slightest disrespect to the eminent Judges who took part in those decisions. The Bengal Judges have to deal with two separate systems of inheritance, the Dayabhaga and the Mitakshara. Both have to be administered to Hindus, and unconsciously the principles of one of the systems of law get mixed up with the other. In *Bulakee Lall* v. *Mussamut Indurputtee Kuar* [1] the question we have to decide was not in issue. The point for decision was whether one of the co-sharers who had become divided from the other in interest can revoke a power of attorney jointly given by both to manage their properties. After quoting Story on Agency, the learned Judges say "that the parties are not in a position substantially different from that of a joint Hindu family." It is difficult to see how such a position is tenable. However that may be, they proceed to apply the Mayuka

1. (1865) 3 W. R. 41.

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to the case in question and say "And any act or declaration, showing unequivocal intention on the part of any share-holder to hold or enjoy his own share separately, and to renounce all rights upon the shares of his co-parceners, constitutes a complete severance or partition." This is purely *obiter*. *Mussamut Vato Koer Rowshun Singh* [1] was decided after the well-known case *Appovier* v. *Rama Subba Aiyan* was decided by the Judicial Committee. The head-note to this case is not accurate. There was a concurrence of the parceners for dividing the property and petitions for registry were presented to the Revenue authorities. The substantial argument of the contesting defendants was that there should be a division by metes and bounds. The learned Judges held that *Appovier's case* was a complete answer to that contention. The same learned Judges decided *Debee Pershad* v. *Phool Koeree alais Gheena Koeree* [2]. They held that a previous plaint which only sought for a declaration of rights was not sufficient to constitute a divided status, but that if the suit had been one for partition, it would have been different. The second statement was unnecessary for the decision of the case. Some months before this decision was pronounced, a Full Bench had to consider this and other connected questions. Curiously enough, no reference is made in the later case to the opinion of Sir Barnes Peacock to which I shall at once refer.

In the Full Bench Case (*Sadabart Prasad Sahu* v. *Foolbash Koer* [3], an undivided Hindu died leaving two widows behind him. His creditors sued the widows for the debt due to them, attached the deceased's share in the joint family property and purchased it in Court auction. The surviving joint member sued to have it declared that the share did not pass to the purchasers by the Court sale. The Full Bench held that the purchaser did not acquire the rights of the deceased owner. There was a further question whether the mortgage of his undivided share created by the deceased was binding on his share. This second question involved the consideration whether the conduct and act of the deceased worked out a divided status. Sir Barnes Peacock says: "I was at one time disposed to think that as one of the several members of a joint family can compel partition of ancestral property against the will of the others (see Mitakshara, Chapter I, Section 5, verse 8), so he might, without

1. (1867) 8 W. R. 82. 3. (1869) 12 W. R. 510.
3. (1869) 3 Beng. L. R. 31. (F. B.)

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the will of the others, alienate that share to which he would be entitled upon partition; but upon reflection I feel that that opinion cannot be maintained according to the true principles of the Mitakshara Law." This considered opinion of the Full Bench must be taken to have overruled all previous decisions to the contrary. Reference may also be made to the interpretation which their Lordships of the Judicial Committee placed on this pronouncement in *Madho Parshad* v. *Mehrban Singh* [1]. Two of the Judges who were responsible for the case in *Mussamut Vato Koer* v. *Rowshun Singh* [2] also sat in the Full Bench. We next come to *Mussamut Phoolbas Koer* v. *Lall Juggessur Sahi* [3]. Mr. Justice Markby in this case does not conceal his disapproval of the ruling of the Full Bench. The case of *Mussamut Phoolbas Kooer* v. *Lall Juggessur Sahi* [3] is really a minute of dissent from the Full Bench decision. The same learned Judge reiterated his views in *Raghubanund Doss* v. *Sadhu Churn Doss* [4]. Here again the pronouncement about the mode of partition was entirely *obiter*. In *Radha Churn Dass* v. *Kripa Sindu Dass* [5], Sir Richard Garth goes back to the view enunciated in *Bulakee Lall* v. *Mussamut Indurputtee Kuar* [6], without adverting to the decision of the Full Bench. On the other hand, Mr. Justice Wilson in *Tej Protap Singh* v. *Champa Kalee Koer* [7], inclines to the view that there should be either a decree or an agreement to divide. In two very recent cases *Bata Krishna Goswami* v. *Gopal Krishna Goswami* [8], and *Bunwari Lal* v. *Daya Sunker Misser* [9], Mookerjee, J. regards the question as still open. In my opinion, the Calcutta decisions give us no definite guide.

In Bombay, as I said before, there is no decision which upholds the Mayukha doctrine that a bare declaration will sever the co-parcenary status. In *Moro Vishvanath* v. *Ganesh Vithal* [10], the learned Judges speak of a contract to divide. *Babaji Parshram* v. *Kashibai* [11] goes the length of laying down that even after decree, unless the partition is by metes and bounds, the status is undisturbed. In *Murari Vithoji* v. *Mukund Shivaji Naik Golatkar* [12], the learned Judges found "a tacit agreement of enjoyment according to shares", although if a declaration was sufficient, it would

1. (1891) I.L.R. 18 C. 157 at p. 161.
2. (1867) 8 W. R. 82.
3. (1870) 14 W.R. 340.
4. (1878) I. L R. 4 C. 425.
5. (1879) I. L. R. 5 C. 474.
6. (1866) 3 W. R. 41.
7. (1885) I. L. R. 12 C. 96.
8. (1906) 5 C. L. J. 417.
9. (1909) 13 C. W. N. 815.
10. (1873) 10 B. H.C.R. 444 at p. 454.
11. (1879) I. L. R. 4 B. 157.
12. (1890) I. L. R. 15 B. 201.

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have been easy to find it. In *Mahadev Laxman* v. *Govind Parashram* [1], a decree for partition was relied on and not the filing of the plaint. West and Bühler in pp. 680 and 681 in dealing with "will to effect a separation" seem to lay down that the assent of all the co-parceners is necessary to effect a partition. It may therefore, be safely stated that in the province where the Mayukha is followed, the Courts have never been asked to hold that a declaration of intention will sever the co-parcenary in regard to joint property.

In Madras, the High Court has consistently held that the filing of a plaint does not put an end to the co-parcenary. In *Sangili* v. *Mookan* [2], the death of one of the co-parceners after suit and before decree was held not to have affected the undivided status. In *Subbaraya Mudali* v. *Manika Mudali* [3], it was laid down that a decree dissolved the co-parcenary notwithstanding the filing of an appeal against it. The learned Judges point out that until decree the co-parcenary continued. In *Sudarsanam Maistri* v. *Narasimhulu Maistri* [4], Bashyam Aiyangar, J. expressly dissented from the view of Sir Richard Garth in *Radha Churn Doss* v. *Kripa Sindu Doss* [5] that a mere declaration by one member is sufficient to effect a separation. There are observations to the same effect in *Aiyyagari Venkataramayya* v. *Aiyyagari Ramayya* [6]. In *Thandayuthapani Kangiar* v. *Ragunatha Kangiar* [7], the learned Chief Justice (Wallis, J.) points out "Partition may be effected by consent and in proper cases by decree." Sankaran Nair, J. says that the practice in this Presidency has always been in accordance with the law as laid down in *Subbaraya Mudali* v. *Manika Mudali* [3]. I entirely concur with this estimate of the practice obtaining among Hindus governed by the Mitakshara Law. Reference may also be made to *Balakrishna Mudaliar* v. *Raju Mudaliar* [8].

Before considering the decision of the Judicial Committee on the subject I shall briefly refer to the views held by the High Court and by the Judicial Committee on certain collateral subjects which are not easily reconcilable with the theory that partition can be effected by a declaration. In all the Courts in India, it is now settled law that a co-parcener cannot by a testa-

1. (1913) I. L. R. 36 B. 550.
2. (1892) I. L. R. 16 M. 350.
3. (1896) I. L. R. 19 M. 345.
4. (1901) I. L. R. 25 M. 149.
5. (1879) I. L. R. 5 C. 474.
6. (1902) I. L. R. 25 M. 690.
7. (1911) I. L. R. 35 M. 289.
8. (1915) M. W. N. 17.

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mentary disposition or by gift *inter vivos* dispose of his share of the joint family property. Their Lordships of the Judicial Committee have given their sanction to this position in *Lakshman Dada Naik* v. *Ramachandra Dada Naik* [1]. In my opinion the denial of this right is not consistent with the hypothesis that a unilateral declaration to sever the status is enough. This view receives support from the decisions which lay down that a disposition by will or gift will be valid if the consent of the other co-parceners is obtained. See *Indar Sahai* v. *Shaiam Bahadur* [2], and *Parmanandas Jivandas* v. *Venayek Rao Wassudeo* [3].

On the question of the power of a member to alienate for consideration his share of the property it is somewhat curious that it should be conceded in Madras and Bombay, while it is denied in Bengal. The earlier Bengal decisions enunciating the view that a declaration of intention will sever the joint status logically requires that the co-parcener should have power to dispose of his share. This is apparently Mr. Justice Markby's view. Their Lordships of the Judicial Committee held in *Balgobind* v. *Narain Lal* [4], that an undivided member is not competent to alienate his share in Bengal and in the United Provinces. It is significant that this restriction is said to apply to alienation without the consent of the co-parceners. See also *Madho Pershad* v. *Mehrban Singh* [5]. This pronouncement lends further support to the proposition that in dealing with co-parcenary property individual acts or declarations are of no avail, but that they would be valid if assented to by the others interested in the property. There is only one other class of cases to which reference may be made. It has been held in Madras that even after alienating his share the alienor continues to be a member of the joint family. *Nanjaya Mudali* v *Shanmuga Mudali* [6], and *Maharaja of Bobbili* v. *Venkataramanjulu Naidu* [7]. These decisions all proceed on the theory accepted in Madras that a unilateral act is not sufficient to effect partition.

Mr. Krishnaswami Aiyar referred to the analogy of partition among joint tenants. A co-parcenary under the Hindu Law has many features in common with joint tenancy. The principles which apply to the severance of a status of joint tenancy therefore deserve consideration.

1. (1880) I. L. R. 5 B. 48
2. (1913) 25 M.L.J. 57.
3. (1878) I. L. R. 7 B. 19.
4. (1893) I. L. R. 15 A. 339.
5. (1890) I. L. R. 18 C. 157.
6. (1914) 26 M. L. J. 576.
7. (1914) 27 M. L. J. 409.

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It was held in *Partriche* v. *Powlet* [1] that a declaration by one of the tenants will not put an end to the joint tenancy. In *In re Wilks, Child* v. *Bulmer*, [2] it was decided that the presentation of a bill does not arrest survivorship. The filing of a plaint cannot be in a better position. On the other hand, in *In re Dodson: Yates* v. *Morton* [3] it was ruled that a decree would terminate the joint tenancy. See also Freeman on Co-tenancy and Partition S. 31. I am of opinion that these decisions are applicable to determine the rights of co-parceners in India.

In my view it is not right to say that the other members are not entitled to be heard when one of them wishes to separate himself from them. While each individual member has a right to his share the others have a contingent right by survivorship to succeed to it. It may be unreasonable to withhold assent on this ground; but as undoubtedly the right of survivorship exists, in reason there can be no severance of the status unless they consent, or until the Court decrees partition.

Now I shall proceed to consider the decisions of the Judicial Committee. If they are clear and definite, whatever may be my view of the law, I am bound to follow them.

In the first of the cases decided by the Judicial Committee *Rewun Persad* v. *Radha Beeby* [4] it was held that a bequest to two brothers subject to a life estate did not create a joint tenancy, but only a tenancy-in-common. Further there was also a finding that the brothers had agreed to divide, although possession did not pass. The second case is that of *Appovier* v. *Rama Subba Aiyan* [5]. It has always been treated as the leading case on the subject of the mode of effecting a partition. It laid down explicitly that a division by metes and bounds was unnecessary, and that an agreement to divide can be gathered from the acts and conduct of the parties. Their Lordships nowhere intimate in this case that a unilateral declaration will suffice. The case in *Ram Chunder Dutt* v. *Chunder Coomar Mundul*, [6] has given some trouble in understanding it. After reading it over again, I am satisfied that the severance of the status of co-parcenary among the Ghoses was not attributed by their Lordships of the Judicial Committee to anything done by one of the brothers without the knowledge and consent of the others. The determination of joint status and the

1 (1749) 2 Atkins 54.
2. (1891) 3 Ch. 59.
3. (1908) 2 Ch. 638.
4. (1846) 4 M. I. A. 137.
5. (1866) 11 M. I. A. 75.
6. (1869) 13 M.I.A. 181.

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substitution of co-ownership are not traced to unilateral acts. I do not think this case helps the respondent. In *Runjeet Singh* v. *Kooer Gujraj Singh* [1], the separate enjoyment of the income of particular portions of the family property by each of the members was held not to constitute a divided status. *Baboo Doorga Pershad* v. *Mussumat Kundun Koowar* [2], follows *Appovier* v. *Rama Subba Aiyan* and points out that whether a course of conduct pursued by the members effected a division in interest would depend upon the intention of the parties. The next decision *Joy Narain Giri* v. *Girish Chunder Maiti* [3], requires careful examination. One of the two undivided members who was expelled by the other from the family house sued for a declaration of his right and mesne profits. He obtained a decree in the Courts below and died pending the appeal to the Privy Council. His widow was brought on record and their Lordships confirmed the decree. The second suit was instituted by the surviving member for a declaration that the deceased died undivided and that a will executed by him was invalid. Two propositions were laid down by their Lordships. Firstly, that the decree, though not in terms one for partition, effectively destroyed the joint estate; secondly, the conduct of the parties showed distinctly that they regarded themselves as divided. The following passage was relied on by Mr. Sreenivasa Aiyangar: "Their Lordships regard the conduct of Shibpershad Giri, when he left the house in which both he and Joy Narain Giri lived, and withdrew himself from commensality with his cousin, as indicated a fixed determination henceforward to live separately from his cousin, and they treat the fact of his borrowing money for his separate maintenance as well as his making a will, as indicating, at all events, that he himself considered that a separation had taken place. His plaint indicates that he accepts what he terms the expulsion of his cousin from the joint family, and claims the share to which he would be entitled after that expulsion, and after separation." The reference to the acceptance of the expulsion shows that in the opinion of their Lordships it was necessary that there should be an agreement between the parties. I do not think this decision is any authority for the proposition contended for by the learned Vakil for the respondent. In *Chidambaram Chettiar* v. *Gouri Nachiar* [4] there

1. (1873) L. R. 1 I. A. 9.
2. (1873) L. R. 1 I. A. 55.
3. (1878) L. R. 5 I. A. 228.
4. (1879) L. R. 6 I. A. 177.

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was a preliminary decree for partition and a Commissioner was appointed to ascertain the extent of the family property. The plaintiff died before a final decree could be passed. It was contended that the members remained undivided. Their Lordships negatived this contention and said that from the date of the preliminary decree the brothers became separate in estate, "if they had not previously become so." It was argued that this last clause pointed to a leaning on the part of their Lordships to the position that the plaint itself effected a partition. On an examination of the original records, it is clear that the reference was to the deposition of the contesting co-parcener in which he said that he had no objection to a division of the properties. *Ram Pershad Singh* v. *Lakhpati Koer* [1] only lays down that a decree ascertaining the shares of the members, though no division by metes and bounds followed it, effected a partition. In *Parbati* v. *Naunihal Singh* [2] all the members had jointly petitioned the Collector that their joint property should be held in specific shares and requested him to make separate entries in the Revenue Register to that effect. It is afterwards contended that the members were undivided. Their Lordships of the Judicial Committee held that the petition and the subsequent conduct of the parties afforded unmistakable evidence of an agreement to regard themselves as divided. Throughout this judgment their Lordships speak of the necessity for an agreement whether written or parol.

Thus far, there is no decision of the Judicial Committee which lends support to the contention that a unilateral declaration of intention will constitute a severance of interest. Naturally the respondent laid great stress on the latest decision of their Lordships in *Pandit Suraj Narain* v. *Iqbal Narain* [3]. As I said at the outset, I cannot accept the suggestion of the appellant's Vakil that the use of the expression "may amount to a partition" indicates that their Lordships without deciding the point proceeded to deal with the facts assuming for the sake of argument that the contention was well-founded. I was at first inclined to agree with this contention. But on further consideration I think that a decision was given on the point by their Lordships. Whether this should be extended to Madras can be decided only by their Lordships of the Judicial Committee. I agree in the conclusions of the learned Chief Justice and of Mr. Justice Sadasiva Aiyar.

1. (1902) L. R. 30 I. A. 1. 2. (1909) L. R. 36 I. A. 71.
3. (1913) I. L. R. 35 All. 80.

PRIVY COUNCIL.

Present:—Viscount Haldane, Lord Wrenbury, Lord Parmoor, Sir John Edge and Mr. Ameer Ali.

[On appeal from the High Court of Judicature at Madras.]

V. Venkatanarayana Pillay, since deceased ... *Appellant**
(now represented by V. Kuppusami Pillay)

V. Subbammal and another ... *Respondents.*

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Venkatanarayana Pillai v. Subbammal.

Will—Dependent relative revocation—Inconsistent disposition ineffectual or invalid—No revocation—Disposition of property and authority to adopt—Inconsistent later disposition—Not revocation of authority to adopt.

If by his will a testator gives property to A and by a codicil gives the same property to B and if in the event, it turns out that B cannot take it, it has to be ascertained from the language of the testator as found in his testamentary documents whether he intended the gift to A should be displaced altogether or that it should be displaced only in favour of B, and if B cannot take, the gift to A should remain.

An alternative inconsistent disposition which is not valid or effectual in itself does not revoke an earlier disposition of the same property.

Held, where a Hindu testator who at the time was competent to dispose of the property by a will, disposed of his property and also gave his wife authority to make an adoption in the event of the son then proposed to be adopted dying and by a subsequent will but at a time when by reason of the adoption that had been made he was incompetent to make any disposition of the property directed a different disposition of the property without any reference to the power to adopt given in the earlier will.

Held that the later will had not the effect of revoking the authority to adopt given by the earlier will. *Alexander* v. *Kirk Patrick* [1].

Appeal from the decree of the High Court of Judicature at Madras dated 12th March 1912 affirming the decree of the High Court in its ordinary Original Civil Jurisdiction.

The Judgment of the High Court is fully reported in 22 M. L. J. 395.

The facts are briefly as follows:

The plaintiff appellant and one Venkatarama Pillai were brothers. Under a partition made in 1860 they effected a division of their family properties. Some of the properties were divided by metes and bounds and the rest were held and enjoyed as tenants-in-common. Venkatarama had no sons but a daughter named Rajammal and she had children. On 8th September 1889 Venkatarama made a will. The will stated that he had selected or nominated as his son one Venkatakrishna the son of his daughter and that in case he should die before completing the adoption his wife should complete the necessary ceremonies and further provided that "in case any danger may happen to my grand-

* P. C. Appeal No. 92 of 1913. 17th November 1915.

1. (1874) L. R. 2 H. L. Sc. 397.

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son Venkatakrishna during the lifetime of my wife Subbammal, my wife may according to her wishes take in adoption one of my daughter Rajammal's sons and give the property to that son." A few months after the execution of the will on 9th February 1890, Venkatarama adopted Venkatakrishna. On March 21, 1890 he made another will without making any reference whatever to the earlier will. Under this will the testator constituted his adopted son the sole legatee in the 1st instance but, provided that if "Venkatakrishna happen to die at any time, his issue shall enjoy the same. Should he have no issue the same shall be divided and given to the issue of my daughter Rajammal * * * should Rajammal have no issue she should enjoy the property for her life, &c." The testator died on 4th April 1890. Venkatakrishna died on 4th June 1891. The second will was proved. No probate was taken for the first will. The second will purporting to dispose of joint family properties of the testator and his adopted son was held to be void by a decree dated 20th November 1894 in the High Court. The widow purporting to act under the power conferred by the 1st will adopted the 2nd respondent another son of Rajammal born subsequent to the death of Venkatarama on 13th August 1906. The plaintiff sued for a declaration that the adoption of the second respondent was invalid and claimed on the footing of intestacy. Mr. Justice Wallis in the Court of 1st Instance dismissed the plaintiff's suit holding that Subbammal had authority and that the authority was subsisting even after the execution of the second will. On appeal the Chief Justice and Sankaran Nair, J. affirmed the Judgment of Mr. Justice Wallis. The plaintiff appealed. Pending appeal plaintiff died, the appeal was prosecuted by the next reversioner Kuppusami.

Sir Robert Finlay, K. C. and *B. Dube* for the Appellant.

De Gruyther, K. C. for the Respondent.

The Judgment of their Lordships' was delivered by

Lord Wrenbury.

Lord Wrenbury—At the date of the first testamentary instrument, *viz.*, the 8th September 1889, the testator, Venkatarama was sole surviving co-parcener of the property here in question. It was ancestral property, but a division had been effected, and of the testator's divided share he had no co-parcener. He could, therefore, dispose of it. Under those circumstances he made a will dated the 8th September 1889, which contained an appointment of his wife and his daughter to be executrixes and

for the present purpose consisted of two parts, *viz.*, (1) a disposal of the property in a certain way, and (2) an authority to his widow in a certain event to take a son by adoption.

He had, and it appears by the will that he had, nominated as his son Venkatakrishna, who was a son of his daughter Rajammal, but he had not completed the adoption. By his will he directed that if he should die before completing the adoption, his wife Subbammal should, after his death complete the necessary ceremonies, and take the said grandson in adoption, and his will contained the following clause:—

"In case any danger may happen to my grandson Siranjeevi Venkatakrishna Pillay during the life time of my wife Subbammal who is one of my executrixes my wife Subbammal may according to her wishes take in adoption one of my aforesaid daughter Rajammal's sons, and give my properties to that son."

An argument was tentatively put forward, but was not pressed by the appellant's counsel that this document was not a will. Their Lordships can entertain no doubt that it was a will. It contained an appointment of executors, and (as has already been pointed out) it was executed by a testator who at its date could dispose of the property of which he purported to dispose.

On the 9th February 1890 the testator completed the adoption of Venkatakrishna. Another member of the co-parcenary thus entered the joint family, and when the testator subsequently died, the property was ancestral property, of which he was not at that date competent to dispose. In this sense, and to this extent, the will of the 8th September 1889 became ineffectual.

On the 21st March 1890 the testator executed another will. It contains a new appointment of executors. They are the two executors appointed by the will of the 8th September 1889, and a third. It discloses on its face that the property of which it purports to dispose is ancestral, but nevertheless purports to dispose of it although at this date the testator had a co-parcener, and could not dispose of it. It contains in Article (5) a gift that, in case Venkatakrishna shall happen to die at any time, his issues shall enjoy the property. It contains no words of revocation of the previous will; is wholly silent as to adoption; and does not refer in any way by revocation or otherwise to the clause in the will of the 8th September 1889 set out above, which gave the widow a contingent power of adoption.

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On the 4th April 1890 the testator died. The will of the 8th September 1889 was not, and the will of the 21st March 1890 was, admitted to probate. On the 4th June 1891 Venkatakrishna died.

In 1893 the plaintiff in the present proceedings being the brother of Venkatarama and thus reversionary heir to Venkatakrishna instituted a suit, and on the 20th November, 1894 obtained a decree that the will of the 21st March 1890 was null and void, and inoperative according to Hindu Law. This must have meant as regards the disposal of the ancestral property.

In this state of facts the widow Subbammal, on the 13th August 1906, adopted the defendant Parthasarathi.

The present suit is one instituted by Venkatanarayana, as reversionary heir of Venkatakrishna, against Subbammal, the widow and Parthasarathi, the son adopted by the widow, for a declaration that his adoption was illegal and invalid.

The appellant advanced two contentions (1) that the document of the 8th September 1889 was not a will—with this their Lordships have dealt above—and (2) that if it was a will, it was revoked by the will of 21st March 1890, and that no power existed in the widow in 1906 to make an adoption.

The appellant rests his case not upon any words in the will of 1890 revoking the will of 1889, for there are none, but upon such an inconsistency between the two wills as that the provisions of the earlier will cannot stand with the existence of the later will. It has already been pointed out that the will of 1889 consists of two parts, and assuming for the moment that the contention is well-founded as to the one part, *viz.*, that which effects a disposal of the property, it does not touch the other part, *viz.*, that which gives a power to adopt.

Whether the contention is well-founded as regards the other part, *viz.*, that which effects the disposal of the property, turns upon the application of the doctrine of dependent relative revocation. This is really a question of intention. If by his will a testator gives property to A and by a codicil gives the same property to B and if in the event it turns out that B cannot take, it has to be ascertained from the language of the testator as found in his testamentary documents whether he intended that the gift to A should be displaced altogether or that it should be

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displaced only in favour of B, and (if B cannot take) the gift to A should remain. If, as in *Tupper* v. *Tupper* [1] the testator's language is that (1) he revokes the gift to A and (2) in lieu thereof he gives to B, it may well be that there is a revocation for all purposes. If, as in *Quinn* v. *Butler* [2], the donee of a power to charge does by his will charge with 4,000 £ to be paid to A and 3,000 £ to be paid to B, C and D equally, and then by codicil revokes the aggregate charge of 7,000 £ made by his will and charges with 7,000 £ for A, the charge in the will is no doubt gone for all purposes. If, as in *Baker* v. *Story*[3] A takes absolutely under the will, but under the codicil takes for life only with a gift over which fails, and there is an ultimate effectual residuary gift, it is difficult to find any room for a contention that the gift by will is not gone altogether. But no one of these authorities is pertinent to the present case. *Alexander* v. *Kirkpatrick*, [4] although a case upon two dispositions, of which the former contained a power of revocation, and not upon two wills, contains a principle applicable in their Lordships' opinion to the present case, viz., that an alternative inconsitent disposition which is not valid or effectual in itself does not revoke an earlier disposition of the same property.

It is admitted that by the will of 1890 the testator could not give his ancestral properties as he purported to do, but it is argued that from the fact that he purported so to give them there is to be inferred an intention that if he could not give them as he purported to do in 1890 his disposition in 1889 should nevertheless be revoked and the argument goes beyond this to affirm that not only his disposition of property in 1889 but also the independent provision conferring a power to adopt given in 1889 is in like manner revoked. Their Lordships do not accept either argument as well founded. The effect of that which has taken place is that there are two testamentary instruments the later must no doubt prevail over the earlier, but the contingent power to adopt in the earlier instrument is unaffected by anything in the later. In their judgment it has been rightly held that on the 13th August 1906 the widow had the power of adoption which she exercised, and the plaintiff's case fails.

1. (1885) 1 K. and J. 665 : 69 E. R. 627. 2. (1868) L.R. 6 Eq. 225.
3. (1875) 31 L. T. 681 : 23 W. R. 147. 4. (1874) L.R. 2 H. L., Sc. 397.

Their Lordships will humbly advise His Majesty that the appeal fails and must be dismissed with costs.

Solicitor for the Appellant :—*John Josselyn.*

Solicitor for the Respondent :—*Douglas Grant.*

PRIVY COUNCIL.

Present :—Viscount Haldane, Lord Parmoor, Lord Wrenbury, Sir John Edge and Mr. Ameer Ali.

[On Appeal from the High Court of Judicature at Madras].

M. R. M. A. Subramanian Chettiar ... *Appellant* *

v.

Rajah Rajeswara Dorai ... *Respondent.*

P. C.

Subramanian Chettiar v. Rajah Rajeswara Dorai.

Civil Procedure Code O. 32, R. 7—Minor—Compromise without leave—Invalid, though supportable on other grounds—Trust—Consent of Settlor—Payment for—Validity of—Charge given in pursuance—If supportable on other ground.

Held : that a mortgage given by a trustee in pursuance of a compromise in a suit in which he was the guardian *ad litem* of a minor, without the sanction of the Court, is invalid on that very ground though supportable as a proper act on the part of the trustee.

The provision of law making it necessary to obtain the leave of the Court is of great importance to protect the interests of minors and in the absence of such leave, a compromise cannot be supported.

The appellant was one of the creditors of the Rajah of Ramnad who made a voluntary settlement of his Zamindari subject to payment of debts and certain allowances to himself. To pay off the debts, it became necessary to borrow money from certain financiers in England and execute a first mortgage to them. They required the junction of the Rajah of Ramnad to the deed and an agreement by him to postpone his right to the allowance to the mortgage. The trustee promised to give the Rajah a mortgage for 4 lakhs as consideration for the consent. Upon a proper construction of the trust deed, his consent was unnecessary. The charge thus promised to the Rajah was used to create the suit mortgage in favour of the appellant in pursuance of the compromise in the suit brought by him for the recovery of the amount due to him.

Held, that in the absence of evidence that the English financiers would have refused to lend without the junction of the Rajah even if the true legal position were explained to them or that the Rajah would have refused to join unless he was paid the promised charge in favour of the Rajah, could not be supported.

Held also : that the mortgage in favour of the appellant being only the utilisation of the charge in favour of the Rajah must fall with it in the absence of evidence that the trustees had any intention apart from the agreement with th Rajah to place an additional charge in favour of the appellant on the trust estate.

These are consolidated appeals Nos. 108, 118 and 128 of 13 against the decree of the High Court of Judicature at Madras affirming the decree of the Sub-Court of Madura East.

The judgment of the High Court is reported in I. L. R. 32 M. p. 490.

The facts are fully set forth in their Lordships' judgment.

* 16th November 1915.

P. O. Lawrence, K. C., De Gruyther K. C. and *Kyffin* for the Appellant.

Sir Robert Finlay, K. C. and *K. Brown* for the Respondent.

The judgment of their Lordships was delivered by

Lord Parmoor:—These are consolidated appeals from three judgments of the High Court of Judicature at Madras. The appeal which has been argued before their Lordships is one in which M. R. M. A. Subramanian Chettiar is appellant, and Rajah Rajeswara Dorai is respondent. It is unnecessary to refer further to the other two appeals since it is admitted that the decision in those cases depends on the decision given in the case which has been argued.

The question involved in the appeal is the validity of an agreement of compromise executed on the 16th day of January, 1889, and of two mortgages dated respectively the 6th July 1889. The validity of these documents is largely dependent on the consideration whether the trustee under a voluntary settlement of 12th July 1895, had power to give a mortgage bond for 4 lakhs of rupees on the security of a suitable portion of the Ramnad estate to the then Rajah of Ramnad.

The father of the appellant lent considerable sums to the respondent's father, who at all material times was the Rajah of Ramnad. On the 12th July 1895 the Rajah owed his creditors sums of money amounting to 20 lakhs of rupees, including a sum of Rs. 130,000, which he owed to the appellant's father. At that date the Rajah executed a deed of voluntary settlement settling all his Ramnad Zemindary and certain other property, subject to the payment of the debts which he then owed and to certain allowances to members of the family including the Rajah himself therein directed to be made and to the several trusts, provisoes, and declarations therein contained, on the present respondent. who was a minor. The Rajah appointed a trustee Venkata Rangaier, and as coadjutor P. Chentsal Rao, and it was provided that the trustee should not without the permission in writing of the coadjutor enter into any agreement with the creditors or mortgage or sell any part of the trust premises. Subsequent to the execution of the voluntary deed, the Rajah borrowed further sums from the appellant's father giving as security certain jewels and furniture and his allowance under the deed of settlement.

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The sums due to the creditors had been borrowed at a high rate of interest, and the income in the hands of the trustee was not sufficient to meet the charges on the trustee estate. To save the estate, it became necessary to borrow a large sum of money at a moderate rate of interest, and negotiations were entered into between the trustee, the coadjutor, and certain financiers in England. On the 18th June 1897 a preliminary agreement was made between the trustee, Charles Agustus Verner, and Ogilvie, Gillanders & Co., to raise for payment of the debts existing at the date of the settlement of the 12th July 1895 the sum of 160,000 £ and the equivalent in sterling of the Government for a quarter of one year, to be secured by a trust deed vesting the Ramnad Zemindary freed from all incumbrances in trustees for debenture holders. This arrangement was not completed until the 13th of June 1899, on which date the trustee, with the privity and consent of the coadjutor and the Rajah, executed a mortgage of the whole trust estate for the sum of 175,000 £ repayable by, instalments with interest at the rate of 5 percent. The validity of this deed is not in question. Before its execution there were prolonged negotiations between the trustee and the intending lenders. Their Lordships recognise the difficulties which confronted the trustee and it was clearly of the first importance to obtain a large loan at a moderate rate of interest in order to pay off debts carrying compound interest at the rate of 12 per cent.

In the course of negotiations for the English loan the intending lenders required that the Rajah should become a party to the deed, and that the allowances specified in the voluntary deed should be expressly postponed to their security. It is contended on behalf of the appellant that in order to obtain the assent of the Rajah, and the consent of the persons entitled to the payment of allowances, it became necessary and was reasonable and prudent on the part of the trustee, to agree to give a mortgage for 4 lakhs of rupees to the Rajah on the security of a suitable portion of the Ramnad estate such security being subsequent to the mortgage given for securing the repayment of the English loan. This proposal is contained in a letter from the trustee to the Rajah on 25th April 1898, and on the same day the Rajah wrote to the agents of the intending lenders informing them that in the event of their advancing to the trustee a loan on the agreed conditions he would agree that the lenders, or their nominees, should have

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a first charge upon the Ramnad Zemindary and that no part of the marginally-noted allowance payable to him under the voluntary settlement should be paid in any year until all charges, that might be payable to the lenders under the present mortgage, had been paid in full, and that he undertook to execute in favour of the lenders or their nominees such documents as in their opinion might be necessary for carrying out the arrangements. The High Court of Madras have held that assuming—without deciding—it to be within the power of the trustee to create such a charge on the trust estate, the power was not exercised properly and reasonably and in the interest of the estate. Their Lordships concur in the conclusions of the High Court. There is no satisfactory evidence that the Rajah would not have executed the English mortgage deed and consented to postpone his allowance without some payment or consideration. The counsel for the appellant was pressed in his argument before their Lordships to refer them to the evidence in support of his proposition that the Rajah would not have assented to sign the deed and postpone his allowance without receiving payment or consideration. Their Lordships were not referred to any such evidence and the Counsel for the appellant relied on a general statement that the Rajah was a difficult person for the trustee to influence. Apart from any payment or consideration it was in the interest of the Rajah that the intending loan should be satisfactorily arranged and, in the absence of evidence, there is no room for a presumption that he would not sign the deed, or would refuse to postpone his allowance, without some payment or consideration. On the other hand, the documents to which their Lordships have been referred do not support the contention put forward on behalf of the appellant.

The preliminary agreement for the loan was signed on 18th June 1897. On the 22nd September 1897, the coadjutor, P. Chentsal Rao, without whose assent the trustee had not the power to arrange the English loan, sent a telegram to Messrs. Lovelock and Lewes, Chartered Accountants, acting on behalf of the lenders, that:—"The Rajah consented to sign mortgage deed and Rs. 66,000 or possibly Rs. 76,000 of the allowances can be postponed, letter follows." A further telegram was sent on the 28th September 1897 explaining that the Rajah was willing to give a charge upon the Zamindary free of the payment of allowances of Rs. 66,000 and possibly Rs. 76,000 and that this is what the coadjutor meant by postponement. These telegrams

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were followed by a letter of 29th September 1897 in which the later telegram was confirmed, and the coadjutor again states, that the Rajah is quite willing to do what Messrs. Lovelock and Lewes propose, namely to give a charge on the zamindary free from the payment of Rs. 66,000 or possibly Rs. 76,000, out of the allowances of Rs. 130,000 referred to in the trust deed. The position taken up by the intending lenders on the question of the allowances is explained in a letter of 25th November 1897 which was brought to the notice of the trustee, and to which the trustee refers in a letter of 24th December 1897. It is stated that the intending lenders are prepared to proceed with the negotiations for the loan provided that all the allowances in favour of the Rajah and the members of his family are postponed to the security to be given to the debenture holders, both as regards the current payment required for the service of the loan and also in the event of the security having to be enforced. The consent of six members of the Rajah's family was not obtained to the postponement of the allowances, but the consent of the other allowance holders was accepted as sufficient after the intending lenders had obtained an opinion from Mr. Mayne that such consent was not required having regard to the terms of the trust deed.

The material factor is that the letter written by the Rajah on 25th April 1898, after receiving the promise of a payment or consideration of Rs. 400,000 secured by mortgage bond on a suitable portion of the Ramnad estate, does not give any undertaking beyond that contained in the telegrams and letter of September 1897. Under these circumstances their Lordships are of opinion that the appellant has failed to prove the first step which is necessary to justify the placing of a charge of Rs. 400,000 on the trust estate.

In the second place the appellant has failed to establish that the consent of the allowance holders was required to enable the trustee to postpone their rights to the security of the debenture holders, or that the intending lenders would have pressed their objection if the legal position had been explained to them. This point was not argued at any length before their Lordships, though it was evidently a main point in the argument in the High Court. The relevant paragraphs of the voluntary settlement are 7, 23 and 24. In paragraph 23 the settlement sets out

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in the sixth place a trust to make payment of the allowances specified in the second schedule, but these allowances are placed for the purpose of payment after (in the fifth place) the specified debts and the interest on and principal of such other debts and sums of money as shall be incurred or become payable by the trustee for the purpose of paying off all or any of the said debts and sums of money, although under paragraph 24 the trustee is not bound to make the payments in the order mentioned in the deed. Paragraph 7 provides that notwithstanding anything contained in the voluntary settlement, an assign for value in execution of those trusts should hold the estate or interest purporting to be conveyed or assigned to him, in the premises thereby assignee free and discharged of the trusts, provisoes, directions, and declarations therein contained, except as otherwise expressly provided in such assignment. The joint effect of Ss. 7 and 23 is that the trustee had power to place the loan security for the payment of the specified debts in priority to the allowance payments and that the assign for value would hold the estate or interest conveyed or assigned to him assured free and discharged of the trusts contained in the voluntary settlement except as otherwise expressly provided.

Section 24, which provides that the trustee shall make the serveral payments under the voluntary settlement as and when the same shall be required, cannot be construed to curtail the discretion given to the trustee in paragraph 23. It is material to observe that the trustee in a telegram to the co-adjutor on 18th March 1898, said that he and the co-adjutor must point out to the London people that under the trust deed they are empowered to attend to the service of interest prior to payment of allowances. A similar opinion was expressed by Sir V. Bhashyam Iyengar on 30th June 1898, and by Mr. Mayne on 20th September 1898. The Counsel for the appellant justified the action of the trustee in giving consideration for the consent of the Rajah to postponement, although such consent was not legally required, on two grounds. In the first place he said that, apart from questions of strict right, the intending lenders insisted on the postponement of the specified allowances. The answer is that there is no evidence that the intending lenders would not have altered their attitude if the true legal position had been insisted on throughout the negotiations. They did alter it so far as regards six of the allowance holders, after obtaining the

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opinion of Mr. Mayne. In the second place, it was said that, although the trustee might have had the power to postpone the payment of allowances, he was justified in his action out of regard to the position of the Rajah and his family, and his unwillingness to incur the ill-will of the Rajah and of the other allowance holders, which he might have incurred if he had used his power witout their consent. Their Lordships cannot accept this explanation as justifying the trustee in placing a burden of Rs. 4,00,000 on the trust estate, or come to any other conclusion than that the trustee was not acting properly and reasonably and in the interest of the trust estate when he undertook to give the mortgage bond to that amount in favour of the Rajah.

The next question is whether the agreement of compromise of 16th January 1899, and the two mortgages of the 8th and 16th July 1899, can be supported if the promise to give the mortgage bond of Rs. 4,00,000, on the security of the trust estate is invalid as not being within the powers of the trustee. The recitals of the compromise deed recite the agreement with the Rajah to give a mortgage bond for Rs. 4,00,000 on the trust estate, thus giving the appellant full notice. Moreover the compromise deed is based, not on imposing a new charge on the trust estate, but on utilising the charge, already promised to the Rajah. The deed carries out this proposal by providing for the payment of certain sums to the appellant so soon as the English loan is obtained, and by giving as security a third mortgage on the trust estate, a first mortgage being executed to secure the English loan; and a second to secure the loan of Rs. 1,00,000 due to another creditor. In other words the compromise deed assumes the validity of the agreement with the Rajah and there is no evidence that the trustee or the co-adjutor had any intention, apart from the agreement with the Rajah, to place an additional charge in favour of the appellant on the trust estate.

The mortgage of the 6th July 1899, was executed in pursuance of the provision contained in the deed of compromise. The amount thereby secured was Rs. 4,73,143, with further interest thereon less the sum of Rs. 50,000 which the trustee agreed to pay in one week. Towards this sum the trustee paid to the appellant Rs. 20,000, and secured the balance by a mortgage on crops on the 13th July 1899. This is the second mortgage to which this appeal relates. On the second mortgage appellant

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has received certain payments from the trustee and has been ordered to repay the sums to the credit of the trust estate. It is impossible that these mortgages can be regarded as valid and binding upon the properties therein comprised if the deed of compromise is not valid, and their Lordships concur in the conclusion of the High Court both as to the validity of the deed of compromise and of the two mortgages and as to the amount of the repayment ordered to be made by the appellant to the credit of the trust estate.

If, on other grounds, the deed of compromise could be supported, it is invalid, in not complying with the condition imposed by S. 462 of the Code of Civil Procedure applicable when the compromise was made. One of the parties to the suit was a minor, the present appellant, and the trustee of the voluntary settlement was appointed his guardian *ad litem*. S. 462 of the Code of Civil Procedure enacts "that no next friend or guardian for the suit "shall, without the order of the Court, enter into any agree- "ment or compromise on behalf of a minor, with reference to "the suit in which he acts as next friend or guardian." In the present case the leave of the Court was not obtained, and in the absence of such leave the compromise cannot be supported. Their Lordships regard the provision making it necessary to obtain the leave of the Court as of great importance to protect the interests of a minor. It clearly applies to the compromise in question in the present appeal. It may be well to quote the language used by Lord Macnaghten in *Manohar Lal* v. *Jadi Nath Singh* [1].

"It is not sufficient that the terms of a compromise are before the Court. There ought to be evidence that the attention of the Court was directly called to the fact that a minor was a party to the compromise, and it ought to be shown by an order on petition, or in some way not open to doubt, that the leave of the Court was obtained".

Reference may also be made to the more recent case of *Ganesha Row* v. *Tuljarama Row* [2].

In the opinion of their Lordships these appeals fail and should be dismissed with costs, and they will humbly advise His Majesty accordingly.

Solicitor for the Appellant :—*Douglas Grant.*

Solicitors for the Respondent :—*Chapman Walker* and *Shepard.*

[*End of Vol. XXIX*]

1. (1906) L.R. 33 I.A. 128. 2. (1913) L.R. 40 I.A. 132; 36 M. 295; 25 M.L.J. 150.

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Annexation of territory is an act of State and any obligation assumed under a treaty either to the ceding Sovereign or to individuals is not one which Municipal Courts are authorised to enforce.

After cession of territory, the only legal enforceable rights against the new Sovereign are those which that new Sovereign by agreement express or implied or by legislation chooses to confer.

The implied agreement might be proved by circumstantial evidence, such as the mode of dealing with the parties which the new Sovereign has adopted, his recognition of their old rights and express or implied election to respect them and be bound by them.

It is only for the purpose of determining whether and to what extent the new Sovereign has recognised the anti-cession rights of the parties, the consideration of the existence, nature and extent of those rights is relevant.

Prima facie a lease for a term does not import any right to a renewal of it. On the contrary, it *prima facie* implies that the lessee's right to the premises demised ends with the term.

Where from the time of the cession the plaintiff and his ancestors were holding under *pattas* purporting to be only for terms of seven years, which contained no clause for renewal while the very first of them contained a clause requiring them to hand over the estate on the expiration of the term and the Government never recognised such a right. *Held*, that the plaintiff had failed to discharge the onus which lay on him of proving an agreement express or implied with the Government imposing on them a legal obligation to renew for all time if required and conferring on the lessee the correlative legal right to demand that renewal.

The fact that the Government did not intend to disturb the lessees and even intended, if all things went well, to grant to them as acts of grace new leases as the old leases expired and that the lessees believed and trust-

A

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ed that this would be done and the fact that for a long time the leases were renewed might give rise to moral obligations but the mere repetition of such acts of grace could not *per se* give legal right to their continuance.

Held, also that Bombay Act VI of 1862 had no application to Kasbatis and that Act VI of 1888 which applied not the effect of enlarging the leasehold interest reserved to them under contracts with them into a permanent heritable and transferable property.

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The suit was to recover damages from the Secretary of State for India in Council, the claim being founded on the following facts, *viz.*, (1), that, purporting to act under S. 22, cl. (3) of the Assam Labour and Emigration Act, VI of 1901, the Collector and District Magistrate of Ganjam closed a labour recruiting depot at Berhampore, which was intended for the accommodation of coolies recruited on behalf of certain Tea Planting Associations in Assam; (*b*) that the Governor-in-Council by a Government order ratified and confirmed the Collector's order closing the depot till that date; (*c*) that the Government in the said order made

Assam Labour and Emigration Act—*Contd.* PAGE.
certain remarks which were defamatory of the plaintiff. The plaintiff claimed to have been appointed agent by the said Associations and to be entitled to a commission of Rs. 7-0-0 for every cooly recruited by him and alleged that by reason of the Collector's order he was prevented from recruiting coolies and earning his commission.

Held, per Sadasiva Aiyar, J: The Government could not be made liable for the order of the Collector, because, in purporting to exercise his statutory powers under S. 22 cl. (3) of the Assam Labour and Emigration Act, he was not acting as the agent of the Government, and as such, the Government could not also ratify the act so as to make itself liable.

There being no proof that in closing the depot, the Collector maliciously intended by his order to hit at the plaintiff's right to the benefit of the commission obtainable by him from his employers or that the Collector was actuated by any indirect motive against the plaintiff, the Collector himself even in his personal capacity, could not be made liable to the plaintiff.

Per Bakewell, J.: The plaintiff was neither an employer nor his licensed agent within the meaning of the Act; the business carried on by him was illegal; and there could be no right of action in respect of such business.

Even if plaintiff could be considered to be in the position of an employer, the suit was liable to be dismissed on the ground that there was no proof that the damage complained of by plaintiff was the consequence of the Magistrate's Act and that in any case it was too remote to give the plaintiff a cause of action.

Held. per Sadasiva Aiyar and Bakewell, JJ.:—The Governor-in-Council could not be held liable for publishing words concerning the plaintiff in the course of the official duties of the Governor-in-Council when it is not alleged that the publication was made maliciously and without reasonable and probable cause.

Per Sadasiva Aiyar, J.:—On the highest grounds of public policy, Government should not be made liable for the tortious acts of its agents or servants except probably for acts done in the course of those kinds of transactions, which even an ordinary private mercantile firm can enter into.

Rogers v. *Rajendro Dutt* (1860), 8 M. I. A. 130, 181 followed.

Ross v. *Secretary of State for India*. (*Sadasiva Aiyar and Bakewell, JJ.*) 280

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Benami purchaser—*Test—Comparison with English law—Estoppel—Landlord's title—Denial by tenant—S. 116, Evidence Act—Practice—Inference—Non-production of document.*

Benami dealing is common to Hindus and Mahomedans alike and is quite unobjectionable.

It resembles the English rule that the trust of a legal estate results to the man who pays the purchase money. The exception in that law by way of advancement in favour of wife or child does not apply in India but the relationship is a circumstance which is taken into consideration in determining whether the transaction is benami.

Benami purchaser—*Contd.* PAGE.

The general rule in the absence of all other relevant circumstances is, as stated by Lord Campbell in *Dhurm Debia Pandey* v. *Mussamat Shamsundari Debia* (1848) 3 M. I. A. 229 "to consider from what source the money comes with which the purchase money was paid."

Where A, a Hindu, purchased a bungalow in the name of his Mahomedan mistress, B, but it appeared that he had already made provision for her two sons by him and possession remained with him and his wives during his lifetime and after his death with one of his widows.

Held, that the natural inference was that the purchase was *benami* for A.

Held further, that the Court was not entitled to draw any inference against the plaintiff, the widow, from the non-production of account books relating to the estate as these did not necessarily form any part of her case and if any entries relating to the bungalow appeared therein it was for the defendant to have summoned for them and to have got them admitted in evidence.

It is open to a litigant to refrain from producing any documents which he considers irrelevant; if the other litigant is dissatisfied, it is for him to apply for an affidavit of documents and to obtain inspection and production of all that appears to him in such affidavit to be relevant and proper. If he fails so to do, neither he nor the court at his suggestion is entitled to draw any inference as to the contents of any such documents.

S. 116 of the Indian Evidence Act rests on the principle well established by many English cases that a tenant who has been let into possession cannot deny his landlords' title however defective it may be so long as he has not openly restored possession by surrender to the landlord.

Held, accordingly, that a tenant who had been let into possession by the plaintiff was estopped from denying her title in a suit brought by her against him for possession after due notice to quit, relying upon his purchase from B.

Mussammat Bilas Kunwar v. *Desraj Ranjit Singh*. (*Sir George Farwell*). (P. C.) 335

Bombay Act VI of 1862 and Act VI of 1888—Applicability to Kasbatis. *See* Act of State. (P. C.) 242

Bombay City Land Revenue Act II of 1876—*Object—Register of titles —Inspection by public—Sanadi or quit and ground rent tenure—Estoppel against Government as to—Certified extracts stating tenure to be quit and ground rent—Notice by Collector requiring payment of ground rent—Parties not attaching importance to difference—Effect of —Interpretation of purpose of the Act.*

A advanced certain sums of money by way of mortgage on some lands situated in the town of Bombay. His representatives, a firm of surveyors, examined Laughton's Revenue Survey Register and entries in the Collector's Rent Rolls at the Collectorate in both of which reference to grant of Sanad in respect of lands in question in 1824 was mentioned. Certified extracts were obtained: but one of them omitted any mention of the Sanad and wrongly spoke of the title as Rent Roll of quit and ground rent. The

Bombay City Land Revenue Act—*Contd.* PAGE.

notice in which Collector required the payment of quit and ground rent at New Town was also got from the mortgagor. A second advance was made and the solicitor employed inspected the title-deeds and certified extracts and the records at the Collectorates with a mention of Sanad of 1824. In 1908 the Collector for the first time described the lands as Sanadi instead of quit and ground rent land as heretofore. The mortgagee in possession after protest to the Collector instituted the suit for a declaration that the Government was by the conduct of the Collector by reason of the mistakes in the certified extracts and the notice estoppel from denying that the land was quit rent tenure:

Held, that the object of the Bombay City Land Revenue Act II of 1876 by which the Collector is required to prepare and keep a separate register and rent roll of various lands, is to ascertain who is liable for the payment of rent and not to provide for registration of title, the provision as to inspection by the public being merely intended to enable them to find out whether they were properly assessed and as such the statements in the registers could not operate as an estoppel against the Government.

Held, further that in order to interpret a section of an Act, the Act must be read as a whole and its purpose ascertained.

Held, also, that a statement as to the nature of the tenure to the difference in which the parties attached no importance could not operate as an estoppel as to it.

Merwanji Muncherji Cama v. *Secretary of State for India* (*Viscount Haldane*) *P. C.* 299

Charter Act—S. 15—C. P. C. of 1908—S. 115—Object of—Interlocutory orders of Subordinate Courts—High Court—Interference—Jurisdiction. *See* Practice—Pleadings ... ...

Chota-Nagpur Encumbered Estates Act—*Putni lease—Sanction by the Commissioner, to the transaction as distinguished from deeds prepared*—Persona *of the lessee—Misdescription as to—Not material when no mistake as to identity—Non-payment of premium within due date—Acceptance of after—Delay—Maintenance grants — Reversion in—Not included in the Putni.*

Where a proposed lease had the sanction of the Commissioner as required by the Chota-Nagpur Encumbered Estates Act and the rules framed thereunder, but it was objected that the sanction was insufficient, as the lease-deed as finally drawn up had not been approved by the Commissioner.

Held, that the transaction itself in all its essential details having had the sanction of the Commissioner, the objection had no force.

In administrative and departmental action it must necessarily be the case that formal details may have to be entered upon in order to carry into practical effect and put into legal shape, the arrangement to which sanction is adhibited and a challenge merely on the ground that the document ultimately prepared in the carrying out of the transaction duly sanctioned had not been submitted for sanction cannot be sustained.

Held, also further that the description of the lessees as Waston & Co., whereas in fact, they were a limited Company, did not vitiate the sanction, as it was clear that the person intended was the Company.

Chota-Nagpur Encumbered Estates Act—*Contd.* PAGE.

Held, that the objection that the sanction required the premium to be paid before the end of March 1890, and it was not actually paid till 25th June, was also unsustainable, as the delay was not great, and the official manager, *viz*, the Deputy Commissioner, had accepted the amount without objection, especially after the considerable lapse of years that had taken place.

A putni lease of the land, by itself will not include reversionary rights in maintenance grants secured over the land.

Raja Ramkanai Singh v. *Mathewson*. (*Lord Shaw*). (P. C.) 80

Civil Court—Redress in if can be had—Criminal court—Resort to—Necessity—Offence actually threatened—Effect. *See* Highway ... 91

Civil Courts Act (Madras)—Jurisdiction—Valuation—Mortgage—Suit for redemption. *See* Suits Valuation Act—Mortgage 142

Civil P. C. of 1882—S. 317—Applicability—Mortgage—Co-mortgagees—Decree for sale—Execution and purchase of property by one with reservation in favour of Co-decree-holder—Suit by latter for recovery of his share of property purchased—Maintainability. *See* Hindu Law. 329

Civil Procedure Code (Act V of 1908) S. 2 Cl. (11).—*Decree against widow in possession and illegitimate son—Ignorance of will—Sale in execution—Binding against legatee—Executor* de son tort—*Old Code and new, no-difference.*

Where a creditor of the estate ignorant of the true state of affairs, sued the widow in possession and the illegitimate son who would have been the legal representatives but for a will left by the debtor under which the 1st defendant was constituted executor and the plaintiff a legatee and obtained a decree and in execution, the property in possession of the widow was purchased by a stranger.

Held, that the sale was binding againt the plaintiff.

General Manager Dhurbunga Raj v. *Rampat Singh*. (1872) 14 M.I.A. 605f ollowed.

Per Sadasiva Aiyar, J.—The rule enacted in S. 2 cl. (11) C. P. C. is not new and held good even under the old Code.

Siva Bhagiam v. *Palani Padayachi*, (1882) I.L.R. 4 M. 401 dissented from.

Gnanambal Ammal v. *Veerasami Chetty*. (*Sadasiva Aiyar and Napier, JJ.*) 698

——*S.* 11—Res judicata—*Two suits involving the same questions—Judgment in one based on and following the judgment in the other—Appeal only against one judgment and decree—Principal and agent—Agent acting in excess of authority—Acquiescence or silence of principal—Ratification—Indian Trusts Act, S.* 88—*Interest of the agent adverse to that of the principal—Agent deriving advantage from his position—Purchase of immovable property outside British India by agent—Decree by a British Indian Court directing conveyance of the property to principal—Decree for mesne profits—Mandatory injunction—Civil Procedure Code, O.* 21 *Rr.* 34, 52—*Conflict of laws.*

Where the matter in issue in two suits was the same and the suits were tried together on the same evidence and disposed of by the same judge,

C. P. Code—*Contd.* PAGE.

and the judgment in the one case was based on and followed the judgment in the other, though separate decrees were drawn up, an appeal against one of these decrees is not barred by *res judicata* by reason of the fact that no appeal was filed against the other decree.

Midnapore Zemindary Co. v. *Nitya Kali Dasi* (1914) 24 I. C. 248 not followed. *Panchanada Velan* v. *Vaithinatha Sastrial* (1905) I. L. R. 29 M. 333 followed.

In the case of an agent exceeding his authority ratification by the principal may be implied from the mere silence or acquiescence of the principal.

Ramaswami Chetty v. *Alagappa Chetti* (1914) 28 M. L. J. 199 followed.

Where an agent purchased property under circumstances in which his own interests were adverse to those of his principal and thereby obtained a pecuniary advantage for himself, he should hold the advantage obtained for the benefit of the principal, under S. 88 of the Trusts Act.

An agent purchased some immovable property outside British India under circumstances in which he had to hold it for the benefit of his principal. In a suit by the principal in a Court in British India against, the agent, a British Indian subject residing within the local limits of the jurisdiction of that Court, for an account of the profits of the property and for the execution of a conveyance of that property in favour of the plaintiff.

Held, the plaintiff is entitled to a decree for an account of the profits. So far as the execution of the conveyance of the property is concerned, the Courts in British India cannot avail themselves of the procedure provided in O. 21, R. 34 of the Code, if the defendant disobeyed the order. The only other way in which the British Indian Courts can grant this relief is by granting a mandatory injunction directing the agent to execute a conveyance which may be enforced by attachment under O. 21, R. 32 of the Code but in the absence of any precedent their Lordships declined to grant one in this case.

Ramasawmi Chetty v. *Karuppan Chetty* (*Wallis, C.J. and Srinivasa Aiyangar, J.*) 551

——**S. 11**—Res judicata—*Suit against Government and Zemindar for refund of water-cess—In first Court Zemindar's liability not determined—In Appellate Court found but no decree given as memo of objections out of time—Claim against Zemindar for refund of water-cess and penalty—Former recoverable under S. 70, Contract Act—latter in proof of improper conduct—Pre-settlement Inam—Claim against Zemindar inadmissible.*

Where a tenant claimed a refund of water-cess paid by him, from the Government as well as from the Zemindar but the Munsif gave a decree only against the Government, without considering the latter's liability, in his view the relief against the Government being ample, but on appeal by the Government, the Government was held not liable, the Appellate Court holding that the Zemindar alone was liable but as the cross-objections filed by the plaintiff were out of time, no decree was given against the Zemindar.

C. P. Code—*Contd.* PAGE.

Held in the circumstances, the question of the Zemindar's liability was not *res judicata*, either in his favour or against him when his liability for subsequent years came in question.

Where the plaintiff's case was that his lands were mamool wet but that the Zemindar fraudulently represented that they were not and got exemption from water-cess for some other lands in the Zemindari instead and as a consequence the Government levied water-cess and penalty from the plaintiff.

Held that his claim for refund of water-cess might be sustained on S. 70 of the Contract Act but that the claim for the penalty levied could be sustained only on proof of improper conduct on the part of the Zemindar.

But held the finding that the plaintiff's inam was a pre-settlement inam cut the foundation of his claim.

Sri Raja Bommadevara Satyanarayana Varaprasada Rao v. *Desika Sriramalu*. (*Oldfield and Tyabji, JJ*) 597

———**S. 11** *Explanation II—Applicability to suits instituted prior to enactment of*—Res judicata, *law of, not a rule of procedure—Law applicable to suit is law in force at time of its institution -Agraharam—Grant subject to payment of meras and russums—Conditional upon continuance of purposes thereof—Right to enforce payments on failure of purposes.*

Where, in a suit instituted before the enactment of the Code of Civil Procedure 1908, a decision in a suit of 1902, which would not have operated as a bar under S. 13 of the Code of 1882, was pleaded as a bar on the strength of the alteration in the law made by Explanation II to S. 11 of the Code of 1908.

Held that Explanation II to S. 11 of the Code of 1908 had no retrospective operation and that the decision relied upon did not operate as a bar.

Colonial Sugar Refining Co. v *Irving* (1905) A. C. 372. applied.

Where it was found that, though an agraharam was granted subject to the payment of certain meras and russums, yet it was a condition of the grant that the payments were to continue only so long as the purposes for which they were made continued, *Held* that the payments could not be enforced after the purposes failed.

Devanai v. *Raghunatha Rao*. (1913) 13 M. L. T. 351 applied.

Rajah of Kalahasti v. *Kamakshamma*. (*Spencer and Coutts-Trotter, JJ.*) 585

———**Ss. 47, 73**—*Order for rateable distribution—Appeal by judgment debtor—Maintainability—Execution application—Grant of all reliefs prayed for—No formal order of dismissal—Effect—Mortgage decree—Provision for recovery of deficiency from the person and other property of the judgment-debtor—Rateable distribution—Right of decree-holder—Decree, irregular in form, not to be questioned in execution.*

A party to whom a right of appeal is given (if he comes under S. 47 of the Code of Civil Procedure) should not be deprived of it, unless the Code expressly denies it to him. Orders under S. 73 are appealable if they affect parties to the suit.

Sunder Singh v. *Ghasi* (1896) I. L R 18 A. 410. *Krishnabhupati* v. *Vikrama Deva* (1894) I. L. R. 18 M. 13. referred to. *Balmer Laurie &* Co., v. *Jadunath Banerjee* (1914) I. L. R. 42 C. 1 ; *Chennamma* v. *Rajah of Karvetnagar* (1914) I. L. W. 234, distinguished.

C. P. Code—*Contd.* PAGE.

A mortgage-decree (for sale) provided for the recovery of any deficiency that may arise after the application of the sale proceeds towards the mortgage-debt, from the person and other properties of the judgment-debtor. The decree-holder applied for execution in 1905 and obtained all the reliefs he had prayed for. No formal order, however, was passed dismissing the application from the list of pending applications. In 1912, assets were realised in execution of other decrees against the same judgment debtor and were paid into Court. Thereupon, the mortgagee decree-holder applied for rateable distribution. *Held*, that he was entitled to claim rateable distribution of the assets in respect of the balance of his decree amount.

Though all the reliefs asked for by the decree-holder in the application of 1905 had been obtained by him, still it was the duty of the Court to have fixed a date for the final disposal of the application and the fact that it had not done so, had the effect of keeping the application of 1905, pending so as to entitle the decree-holder to apply for rateable distribution.

Tiruchittambala Chetti v. *Seshayyangar* (1881) I. L. R. 4 M. 383.

Per Seshagiri Aiyar, J.: The fact that the decree-holder moved the Court only for a particular remedy open to him cannot lead to the inference that he was not entitled to ask that his decree be satisfied by other means which the law enables him to adopt.

Per Kumarasawmi Sastri, J.—The mortgage-decree in question was not in accordance with the provisions of the Transfer of Property Act, but the irregularity could not be questioned in execution proceedings.

Rajah of Kalahasti v. *Venkataperumal* (1911) 21 M. L. J. 1036, referred to.

Rajah of Karvetnagar v. *Venkata Reddi* (*Seshagiri Aiyar and Kumarasami Sastri JJ*) 96

———**S. 47**, *O. 21, R. 103—Execution Sale—Delivery of possession decree-holder purchaser—Application by defendants to set aside, dismissal of—Appeal—Amendment—Objection to, on the ground of limitation, when allowed in appeal.*

In execution of the decree obtained by him, a decree-holder purchased the property of some of the defendants in the suit, though they had been exonerated from liability, by the decree. These defendants applied to set aside the delivery of possession to the decree-holder and the application was dismissed. *Held*, that the order of dismissal was one under S. 47 of the C. P. Code and was therefore appealable.

Where the Lower Court allows an application to be amended, an objection to the amendment, on the ground of limitation, will not be allowed to be raised for the first time in appeal, if the appellate court has no materials before it for the determination of the question of limitation.

Sivasamba Iyer v. *Kuppan Samban* (*Oldfield and Seshagiri Aiyar, JJ*) ... 629

———**S. 73.** Rateable Distribution.—Right to.—Execution Application —Pendency of what amounts to *See* C. P. C. of 1908 ss. 47, 73 ... 96

———**S. 86**—*Ruling Chief—Suit against as trustee of temple in British India—Consent—of Government—Necessity for—Filing of statement and pleading on merits—Whether waiver.*

No suit can be maintained against the ruling Chief of a Native State even in his capacity as the trustee of a temple situate in British India without the sanction required by S. 86 of the Code.

B

C. P. Code—*Contd.* PAGE.

Pleading on the merits after pleading privilege does not amount to waiver *Chand Lal* v. *Awah Bin Umar Sultan* (1896) I. L. R., 21 B. 351. not followed,

Narayana Moothod v. *Dewan of Cochin* (*Oldfield and Sadasiva Aiyar, JJ*) 667

———**S. 92**—*Suit under—Sanction given to more than two persons—Suit by two, if maintainable.*

Where sanction is given under S. 92 of the Civil Procedure Code to more than two persons, two of them alone cannot sue

Maddala Bagavannarayana v. *Vadapalli Perumallacharyulu.* (*Wallis, C.J. and Seshagiri Aiyar, J*) 231

———**S. 97**—Preliminary decree—What amounts to—Omission to appeal from—Appeal from final decree—Maintainability—Partnership suit. *See* Partnership (P. C.) 70

———**S. 105, Cl. (2)**—Remand order—Revised Judgment—Appeal from—Findings given at time of remand if can be attached. *See* Malabar Law 772

———**S. 115,** (*a*) *and* (*c*)—*Applicability of, to Presidency Small Cause Courts Act—Suit in ejectment—Erroneous finding that lease has been determined—Decree based on that finding—Interference by High Court—No question of jurisdiction—Presidency Small Cause Courts Acts, S. 41.*

The High Court has power under S. 115 of the Code to revise the decisions of the Presidency Small Cause Court.

Haladhar Maiti v. *Choytonna Maiti* (1903) I. L. R. 30 C. 588; *Sarat Chandra Singh* v. *Brojo Lal Mukerjee* (1903) I. L. R. 30 C. 986; *Ramadin Bania* v. *Sewbalak Singh* (1910) I. L. R. 37 C. 714. followed. *Ismalji* v. *Macleod* (1906) I. L. R. 31 B. 188. dissented from.

The determination of a tenancy by a valid notice is not a condition precedent to the exercise of jurisdiction under S. 41 of the Presidency Small Cause Courts Act. Mere mistake in fact or in law is no ground for revision.

Held, that an order in ejectment under S. 41 of the Presidency Small Cause Courts Act based on an erroneous finding as to the validity of the notice given could not be interfered with in revision by the High Court.

Amir Hasan Khan v. *Sheo Buksh Singh,* (1884) I. L. R. 11 C. 6. referred to.

Vuppuluri Atchayya v. *Seetaramachandra Rao* (1912) 24 M. L. J 112 distinguished.

Venkataramanujulu Naidu v. *Ramasami Naidu* (*Oldfield and Sadasiva Aiyar, JJ.*) 353

———**S 148**—Applicabilty—Decree fixing time for doing an act—Extension of time—Power of Court. *See* C. P. C.—Or. 34 R. 8. ... 708

———**Or. 1 R.** 8—Sanction obtained subsequent to suit—Sufficiency. *See* Highway 91

———**O. 2, R. 2**—*Village Munsif's Court—Suit on portion of claim in—Subsequent suit for balance in Civil Court—Not barred—Purchases on different dates—Cause of action distinct.*

Order 2 R. 2. does not bar a suit brought for the balance of a claim arising out of a cause of action after a suit has been brought for one portion of the claim in the Village Munsif's Court.

C. P. Code—*Contd.* PAGE.

Quaere: Where a customer makes distinct purchases on distinct dates, if the merchant has not got a distinct cause of action in respect of each purchase or set of purchases.

Augustus Brothers v. *Fernandez.* (*Sadasiva Aiyar and Napier, JJ.*) ... 474

———**O. 21, R. 2**—*Inquiry by Court—Mortgagee in possession—Decree not providing for accounts of profits—Taking of accounts in execution—Not permissible—Statement by decree holder of willingness to give credit for profits in application for sale—Inquiry as to amount—Notice to judgment-debtor on—Executability as arrangement sanctioned—Estoppel.*

Where a decree for sale was passed in favour of a mortgage in possession for principal and interest but the decree failed to provide for the taking of accounts of the profits that might thereafter be received by the mortgagee.

Held, that it was not open to the executing Court to direct the taking of such accounts and the fact that the parties put a different construction on the decree made no difference.

But held, the decree-holder having intimated to the Court in his application for sale that the net profits should go in reduction of the decree amount, it was open to the Court to treat the application as a certificate of adjustment and direct an inquiry as to the amounts collected by him.

The circumstances under which the Court could direct an inquiry in connection with an alleged adjustment considered.

Held, also the Court having ordered notice on the intimation of the decree-holder that he was prepared to give credit for amounts collected and the judgment-debtor not having objected to the course, the arrangement could be given effect to in execution on the principle of *Sadasiva Pillai* v. *Ramalinga Pillai* (1875) L. R. 2 I. A. 219.

Lodd Govinda Doss v. *Rajah of Karvetnagar* (*Seshagiri Aiyar and Kumarasami Sastri, JJ.*) 219

———**O. 21, R. 2, Cl. 1 and 2**—*Part payment within time uncertified—Execution application out of time—Period of Limitation if extended—Limitation Act S. 20.*

A part payment made out of court within the period of limitation is sufficient to save a decree from the bar of limitation even if the payment is not certified before the expiry of the period of limitation.

Lakhi Narain v. *Felamami Dasi* (1914) 20 C. L. J. 181 and C. R. P. 880 of 1914, followed.

Rajam Aiyar v. *Ananthalratnam Aiyar.* (*Abdur Rahim and Spencer, JJ.*) — 669

———**O. 21, R. 31**—*Specific Relief Act S. 11—Suit for specific movable property—Allegation and proof—Onus on plaintiff—Limitation Act of 1908—Arts. 31, 49 and 115—Applicability—Carrier—Suit for compensation against—Suit for return of Specific movable against—Limitation—Maxim "Generalia Specialibus non-derogant—" Application of.*

In order to entitle a person to obtain delivery of specific movable property by suit and to enforce the decrees obtained by the stringent methods provided in Order 21, Rule 31, of the Code of Civil Procedure, he should allege and prove facts which entitle him to compel the delivery of

C. P. Code--*Contd.* PAGE.

the specific movable under the provisions of S 11 of the Specific Relief Act.

The effect of the amendment in 1899 of Art. 31 of the Limitation Act is to make it applicable to a claim against a career for compensation for non-delivery of goods irrespective of the question whether the suit was laid in contract or in tort. Art. 49 is inapplicable to such a case.

Semble, Art 49 applies when in a proper case a claim is made against a career for the return of a specific movable.

Where, in a suit by a consignor against a career, the plaint asked for the return of the plank consigned but not delivered to the consignee and also for Rs. 21-12-0 being the loss of interest but contained no allegation that the defendant was in possession of the plank in question and it was obvious from the correspondence between the parties filed in the case that the defendant was not in possession thereof.

Held, that in so far as the suit could be regarded as a suit for the return of the specific plank, the case did not come within S. 11 of the Specific Relief Act, and the suit must be dismissed.

That, if the suit was regarded as one for compensation for failure to deliver the plank in breach of the contract under the bill-of-lading, it was governed by Art. 31 and not by Art. 49 or 115 of the Limitation Act.

Venkatasubba Rao v. *The Asiatic Steam Navigation Company*. (*Wallis, C. J., Ayling and Sadasiva Aiyar, JJ.*) 342

———**Or 21, Rules 34 52**—Applicability—Principal and agent Purchase of immovable property by agent outside Br. India—Suit by principal in Br-Indian court—Jurisdiction—Decree directing conveyance of property—Mandatory injunction to execute conveyance—Decree for mesne profits. *See* C. P. C. S. 11—*Res Judicata* 551

———**O. 21, R. 35**—*Symbolic delivery of possession—Obstruction by third person, to actual possession—Second application.*

A decree-holder is not entitled to file a second application for possession under O. 21, R. 35 Civil Procedure Code after he is once put in possession in accordance with an order passed on a previous application filed under the same order and rule.

Gopal Das v. *Than Singh* (1882) I. L. R. 4 A. 184 followed.

Thandavaroya Mudali v, *Subrahamania Gurukkal* (*Sadasiva Aiyar and Napier JJ.*) 504

———**Or. 21, R. 63**—Unsuccessful claimant—Declaratory suit by—Jurisdiction—Valuation for purposes of—Test. *See* Suits Valuation Act—S. 4 728

———**Or 21. R. 93**—Execution sale setting aside—Auction-purchaser—Suit to recover purchase-money—Maintainability—Sale set aside for want of saleable interest—sale set aside for irregularity—Distinction—Decree-holder responsible for irregularity—Effect. *See* Right of suit. 467

———**O. 22, R. 9**—*Appeal*—Ex parte *order setting aside abatement—Right of legal representative of respondent to question—Limitation Act, Art.* 120—*Declaratory suit based on denial of title—Cause of action for—Knowledge of denial*

An *ex parte* order in an appeal setting aside abatement is final and binding on the legal representatives of the deceased respondent, subject only to their right to apply for a review,

C. P. Code—*Contd.* PAGE.

Tikait Ajant Singh v. *Christian* (1912) 17 C. W. N. 862. *Ganeswar Singh* v. *Ganesh Das* (1906) I. L. R. 33 C. 1178. followed.

The cause of action for a declaratory suit based on the denial of the plaintiff's title does not arise until the plaintiff has knowledge of the denial. The period of limitation of such a suit is under Art. 120 of the Limitation Act, six years from the date the plaintiff has knowledge of the denial of title—*Tirumal Rao* v. *Tungama Shettithi* (1914) 1 L. W. 134 followed.

The fact that some of the plaintiffs had knowledge earlier will not affect the rights of the others to institute the suit though that may be a ground for the court refusing in its discretion to grant a declaratory decree.

Muruga Chetty v. *Rajaswamy* (*Ayling and Tyabji, JJ.*) 574

——— **O. 32, R. 7**—*Minor—Compromise without leave—Invalid, though supportable on other grounds—Trust—Consent of Settlor—Payment for—Validity of—Charge given in pursuance—If supportable on other ground.*

Held: that a mortgage given by a trustee in pursuance of a compromise in a suit in which he was the guardian *ad litem* of a minor, without the sanction of the Court, is invalid on that very ground though supportable as a proper act on the part of the trustee.

The provision of law making it necessary to obtain the leave of the Court is of great importance to protect the interests of minors and in the absence of such leave, a compromise cannot be supported.

The appellant was one of the creditors of the Rajah of Ramnad who made a voluntary settlement of his Zamindari subject to payment of debts and certain allowances to himself. To pay off the debts, it became necessary to borrow money from certain financiers in England and execute a first mortgage to them they required the junction of the Rajah of Ramnad to the deed and an agreement by him to postpone his right to the allowance to the mortgage. The trustee promised to give the Rajah a mortgage for 4 lakhs as consideration for the consent. Upon a proper construction of the trust, deed his consent was unnecessary. The charge thus promised to the Rajah was used to create the suit mortgage in favour of the appellant in pursuance of the compromise in the suit brought by him for the recovery of the amount due to him.

Held, that in the absence of evidence that the English financiers would have refused to lend without the junction of the Rajah even if the true legal position were explained to them or that the Rajah would have refused to join unless he was paid the promised charge in favour of the Rajah, could not be supported.

Held also: that the mortgage in favour of the appellant being only the utilisation of the charge in favour of the Rajah must fall with it in the absence of evidence that the trustees had any intention apart from the agreement with the Rajah to place an additional charge in favour of the appellant on the trust estate.

Subramanian Chettiar v. *Rajah Rajeswara Dorai* (*P. C.*) ... 856

——— **O. 34, R. 1**—Mortgage—Mortgagee holding two mortgagees—Suit on subsequent mortgager eserving rights under earlier one—Maintainability. *See* Tr. of P. Act—Ss. 61, 99—(F.B.) ... 195

C. P. Code—*Contd.* PAGE.

———**O. 34, Rr. 4** (*1*), *5 and 6—Appendix D, Forms 4 and 11—Mortgage—Suit for sale—Preliminary decree—Costs—Declaration of personal liability of purchaser of mortgaged property subsequent to mortgage—Validity.*

Where the preliminary decree in a suit for sale upon a mortgage contained a declaration of the personal liability of the 2nd defendant (the purchaser of the mortgaged property after the suit mortgage) for plaintiff's costs in case the sale proceeds were not sufficient to pay them as well as the mortgage-money.

Held, that, though such a declaration might be given against the mortgagor, it could not be given against any other party and that the same must therefore be expunged from the decree.

Venugopalachariar v. *Padmanabha Row.* (*Oldfield and Napier, JJ.*) 120

———**O. 34, R. 8**—*Power exercisable only by Court of First Instance—Appeal—S. 148—Not applicable to extensions of time for doing acts allowed by decrees.*

S. 148, Civil Procedure Code, does not apply to the extension of time for doing acts allowed by decrees and the Court has no power under that section to extend the time fixed for the payment of mortgage money by the decree.

Power conferred by O. 34 R. 8 to extend the time fixed for redemption can be exercised only by the Court of the 1st Instance and not by the Appellate Court even in cases where the preliminary decree is one made by the Appellate Court.

No appeal lies against an order extending time for payment of the mortgage amount.

Dharmaraja Aiyar v. *Srinivasa Mudaliar.* (*Sadasiva Aiyar and Napier, JJ.*) 708

———**O. 41 R. 1**—*Civil Rules of Practice R. 49—Production of printed copy of judgment—Necessity for—Rule* ultra vires *under Civil Procedure Code of* 1882—*Not under Civil Procedure Code of* 1908—*Civil Procedure Code, S.* 157—*Effect of—Not validated by.*

Per Sadasiva Aiyar, J.—Rule 49 of the Civil Rules of Practice requires the production of a printed copy of the judgment appealed against along with the appeal memorandum when the judgment contains more than 700 words but having regard to S. 652 Civil Procedure Code of 1882, that rule being inconsistent with S. 541 was *ultra vires* of the High Court and though under Ss. 122 and 128 of the present Civil Procedure Code, the High Court has power to enact rule inconsistent with the rules in the Code, S. 157 has not the effect of validating the rule which was *ultra vires* at the time of its enactment.

Per Napier, J.—Rule 49 of the Civil Rules of Practice does not forbid the filing of a certified copy even when the judgment contains more than 700 words, as such filing a certified copy is sufficient compliance with O. 41 R. 1 and the appeal is validly presented for purpose of limitation.

Ramakrishna Pillai v. *Muthuperumal Pillai* (*Sadasiva Aiyar and Napier, JJ.*) 663

———**O. 41, R. 22**—*Memo of objections—Time for filing—Calculation—Principle.*

The period of one month allowed by O. 41, R. 22, of the Code to a respondent for filing a memo of objections after the date on which notice

C. P. Code—*Contd.* PAGE.

of the appeal is served upon him must be taken to extend up to and including the day before the corresponding date of the next month.

Where therefore a memo of objection was presented on the 16th March by a respondent who had been served with notice on the 13th February, *held*, that the memo was presented out of time.

Chennama Shettithi v. *Krishnayya Setti.* (*Oldfield and Tyabji, JJ*). 182

Civil Rules of Practice—(Madras) R. 161 A—*Aim and nature of—Violation of the rule does not render proceedings after 6 months void* ab initio—*Decree transmitted to a District Court for execution—District Court sending it to a Subordinate Court—Does not give further period of 6 months for execution.*

The aim of rule 161 A of the Civil Rules of Practice is to compel the decree-holder to take prompt steps to enforce the decree. The rule is in the nature of an instruction or direction to the Court to return the papers to the transmitting Court if no steps are taken by the decree-holder within 6 months to execute the decree.

A violation of this rule does not render the proceedings taken after the 6 months void *ab initio*.

Where a decree is transmitted to a District Court for execution and the District Court sends it to a Subordinate Court, the decree-holder will not have a further period of 6 months from the date of the District Court transferring the decree for execution to the Subordinate Court.

Velliappa Chettiar v. *Subramaniam Chetty.* (*Seshagiri Iyer and Napier, JJ.*) 172

Company—*Debentures—Floating charge—Provision that authority to carry on business should cease on default—Business carried on notwithstanding—Charge in favour of officers for salary—Not registered—Validity of—Companies Act, (VI of 1882) S. 68.*

Where a debenture-deed after charging the assets of the Company and providing that notwithstanding such charge, the Company should have the power to carry on business and deal with the assets of the Company until default should have been made for 6 months in the payment of the principal, provided that from and after the happening of such default the liberty to carry on the business should forthwith cease and determine and the charge created by the debenture should be immediately enforceable, but notwithstanding such default, the debenture-holders did not intervene but allowed the business to go on. *Held*, that a charge created in favour of the Secretary and Manager of the Company for their salary which is incidental to the carrying on of business could not be avoided on the ground that the floating charge had already crystallised.

But *held*, that in this case the charge being in favour of the officers of the Company, they could not take advantage of it, as it was not registered as required by S. 68 of the Companies Act.

Nallaperumal Pillai v. *Krishna Aiyangar.* (*Wallis, CJ and Tyabji, J*). 110

Companies Act (VI of 1882)—S. 68. Charge in favour of officers for salary —Meaning Non-Registration—Validity *See* Company ... 110

Contract—Specific Performance—Variation of Contract subsequent to its breach—Decree—Form of. *See* Contract Act—Ss. 62, 63 126

Contract—*Contd.* PAGE.

———**Act—S. 2, (d)**—*Consideration—Contract—Agreement based on past consideration when amounts to contract—Right of suit—Stranger to contract—Right to sue for benefit conferred by contract—Rule—Exception—Right of suit—When* cestui qui trust—*Circumstances determining existence of trust.*

The mere fact that at the desire of the promisor the promisee has done something prior to an agreement is not sufficient to make the subsequent agreement a contract.

Whether or not the agreement will be held to be a contract depends upon whether or not the promisee intended to impose upon himself a legally enforceable liability.

The circumstance that the promisee has left to himself the option of revoking the promise at his mere will, or of otherwise putting an end to the duration of the promise will in itself negative any intention on the part of the promisee to impose upon himself a legal liability.

Circumstances to be considered in determining whether the promisee intended to impose upon himself a legal liability.

Stewart v. *Basey* (1892) 1 Ch. 104, 105 referred to.

When A contracts with B to pay money to C, C cannot merely on the basis of such a contract sue A.

In re *Empress Engineering Co.* (1880) 16 Ch. D. 125 referred to.

In order to enable C to sue as a *cestui qui trust* the contract must be intended to secure a benefit to him.

Gandy v. *Gandy* (1884) 30 Ch. D. 69,70,74 referred to.

The plaintiff sued the defendant, the widow of the Zemindar of Kirlampudi, for the recovery of the arrears of salary agreed to be given to him by the Zemindar. The grounds of the defendant's liability were stated in the plaint to be that, in consideration of great services rendered by the plaintiff and his father to the Zemindar, the latter agreed to give to the plaintiff a salary of Rs. 20 a month during the plaintiffs' lifetime and that in the deed of mortgage with possession executed by the Zemindar in favour of the defendant there was a stipulation that the defendant should pay the allowances to the plaintiff. *Held* that plaintiff could not recover on the strength of the direction to pay contained in the mortgage deed, unless the defendant could be held to have been constituted a trustee for the plaintiff.

Circumstances from which a trust could be inferred considered.

Kasturamma v. *Venkatasurayya Garu* (*Tyabji and Phillips, JJ.*) ... 538

———**Ss. 62 and 63**—*Specific Relief Act, S. 26 (e)—Contract—Novation—Specific performance—Substitution of new contract after breach of original contract—Original contract if can be specifically enforced.*

Per Kumaraswami Sastri, J. (*Seshagiri Aiyar, J. contra*). There is nothing either in S. 62 of the Contract Act or in S 26 (*e*) of the Specific Relief Act to restrict the operation of those sections to variations of a contract prior to its breach. Where there has been a variation of a contract subsequent to its breach, there can be no decree for specific preformance of the contract except with the variation.

Manohar Koyal v. *Thakar Das Naskar*, (1887) I. L. R. 15 C. 319 dissented from.

Contract—*Contd.* PAGE.

The rules of English Law as to variation of a contract after its breach, have not been adopted by the Indian Legislature in framing S. 63 of the Contract Act.

Per Seshagiri Iyer, J.—S. 62 of the Contract Act contemplates that the original contract subsists and that the parties have agreed to replace it by a new contract, while S. 63 deals with cases where there has been a breach of the contract.

The English authorities which recognise the distinction between promises made before breach and those after breach must have been present to the minds of the framers of the Contract Act.

Quaere: Whether S. 26 (*e*) of the Specific Relief Act would not apply to a case which does not come within S. 62 of the Contract Act.

Ramiah Bhagavatar v. Somasi Ambalam. (Seshagiri Aiyar and Kumarasami Sastri, JJ.) 125

———**Ss. 69, 70**—*Payment by part owner of estate of whole estate, to save estate—Right against other co-owners—No personal liability—Charge on their shares—Liability in proportion to their shares—"Person interested in the payment of money," meaning of.*

Where the plaintiff and the 6th defendant were part owners by court auction purchase each of a particular share of an estate of which the 1st defendant was the registered proprietor and owner of the remaining share, and the plaintiff paid the whole of the revenue due on the estate to save the property when it was attached for arrears of revenue, and the plaintiff sued to recover the amount so paid from the 1st and 6th defendants, the property purchased by the 6th defendant being wholly outside the jurisdiction of the Court.

Held, that the plaintiff by paying the whole of the revenue only got a charge on the holdings of his co-sharers who were not themselves personally liable to Government to an amount proportionate to their shares, and was not entitled to get a personal decree against the co-sharers.

That S. 70 of the Contract Act did not apply to the plaintiff's case.

The portion of the estate purchased by 6th defendant being situated in the Agency tracts, outside the jurisdiction of the court, the court had no jurisdiction to enforce a charge over the portion of the estate purchased by the 6th defendant, and the plaintiff must be left to enforce his charge in the Agency Courts

If the purchases of the plaintiff and the 6th defendant were in a private sale, under S. 55 of the Transfer of Property Act, they would each be bound to pay the proportionate share of the Government revenue. The fact that the purchase was in a court auction sale did not make any difference.

As against the 1st defendant, the plaintiff could only get a decree for the share of the revenue proportionate to the land held by him.

S. 69 of the Contract Act did not apply to the case, as the person who is interested in the payment mentioned in that section must be a person who as between himself and the defendant is not bound to pay, though the defendant may be under an obligation to pay a third party. In other words, "the person interested in the payment of money" in S. 69, must be one who is not himself bound to pay the whole or any portion of the amount.

C

Contract—*Contd.* PAGE.

Sree Rajah Simhadri Jagapatiraju v. *Sree Rajah Dakshina Kavala Dugaraju.* (*Wallis, C. J.* and *Srinivasa Aiyangar, J.*) 689

———**S. 70**—Zemindar and tenant—Water cess—Levy from tenant owing to improper conduct of Zemindar—Tenant's right to recover from Zemindar. *See* C. P. C. S. 11... 597

Court Fees Act, S. 7 cl, 5, cl. XI, (cc)—*Act VI of* 1905—*Suit for recovery of immovable property from tenant—Value for jurisdiction purposes same as for Court fees—Madras Civil Courts Act S. 14—Suits Valuation Act 58.*

Having regard to Act VI of 1905, in the case of suits for the recovery of immovable property from tenants the value for purposes of jurisdiction is the same as the value for Court fees purposes and not the value under S. 7 cl. 5 of the Court Fees Act as provided by S. 14 of the Madras Civil Courts Act.

Narayanaswamy Naidu Garu v. *Seshagiri Rao.* (*Sadasiva Aiyar* and *Phillips, JJ.*) 572

Covenant for title—Nature and scope. *See* Vendor and Purchaser ... 122

Criminal Procedure Code, Ss. 179, 181—*Applicability—Criminal Breach of Trust—Magistrate—Jurisdiction.*

Where the complainant, a firm with headquarters at Madras, charged the accused, alleged to have been appointed agent for the sale of the complainant's oil at Nandyal, with offences under Ss. 406 and 409 of the Penal Code, in that the accused misappropriated the money realised by sale of the oil, failed to account to the complainant when called upon to do so, and left Nandyal after locking up his place of business and secreting his account books, *held*, that the case fell under S. 181 of the Code, and the third Presidency Magistrate of Madras, in whose Court the complaint was instituted, had no jurisdiction to try the offence and that the secondary loss at Madras of the complainant's firm would not give the Magistrate jurisdiction.

Per Oldfield, J.—The ensuing of loss quite as much as the existence of dishonest intention is an essential element in the offence of Criminal Breach of Trust. S. 179 of the Criminal Procedure Code can be applied only to cases in which the consequence necessary to constitute the offence ensues in some place other than that in which the accused's act is done.

Krishnamachary v. *Shaw Wallace and Co* (*Oldfield* and *Napier, JJ*). 178

———**Ss. 179, 181**—*Applicability—Criminal Breach of Trust—Essentials of offence—Breach of trust by dishonest use or disposal of property in violation of contract—Jurisdiction—Magistrate.*

The offence of Criminal Breach of Trust is completed (assuming a preliminary trust) by the misappropriation or conversion of the property dishonestly, *i e.*, with the intention of causing wrongful gain or wrongful loss. It is only the intention which is essential. Whether wrongful gain or loss actually results is immaterial, it is a consequence, but no essential part of the offence, and a person is not accused of the offence by reason of it.

Where the accused alleged to be brokers carrying on business in the Bombay Presidency, were charged in two cases on the file of the Sub-Divisional Magistrate at Erode, with the offence of Criminal Breach of Trust in respect of the proceeds of certain hundies entrusted to them for encashment by the complainants, merchants at Dharapuram in the Erode

Cr. P. Code—*Contd.* PAGE.

Sub-Division, and it was found that the hundies were received and cashed by the accused in Bombay and that the cash proceeds were retained and misappropriated there, *held* that the Erode Sub-Divisional Magistrate had no jurisdiction to try the cases.

The offence of Criminal Breach of Trust by reason of dishonest use or disposal of property in violation of contract is committed where the dishonest use or disposal takes place—not where the contract was made or should have been performed.

The Assistant Sessions Judge of N. Arcot v. *Ramasami Asari.* (1914) 26 M. L J. 285, dissented from.

Rambilas In re (*Ayling and Hannay, JJ.*) 175

———S. 233—*Joint trial of two separate calendar cases—Illegality—S. 537, Applicability of—Practice—Division Bench of High Court hearing criminal cases—Power to entertain appeal though Admission Court sitting.*

The fact that a single Judge sitting in the Admission Court is admitting Criminal appeals does not preclude the Bench disposing of criminal work from entertaining appeals presented through the Bench Clerk.

Powers of Benches are to be determined by reference to the rules made by the High Court and not by the notes in the cause list which are merely instructions for the guidance of parties and practitioners.

Where the magistrate framed separate charges and also numbered them as distinct cases, but when the witnesses came to be cross-examined he lost sight of the necessity of keeping the two trials separate and allowed the witnesses to be cross-examined promiscuously in respect of both the charges.

Held, that the trial was illegal and the illegality could not be cured by S. 537, Criminal Procedure Code.

Where after an illegal trial, the accused are acquitted and an appeal is preferred, the High Court cannot itself convict the accused, but can only direct a re-trial.

In this case their Lordships refused to direct a re-trial having regard to the time that had elapsed from the date of the alleged offence.

Per Napier, J. Obiter.—The decision in *Subramania Aiyar* v. *King Emperor* (1901) I. L. R. 25 M. 61 does not compel the court to hold that in no case a misjoinder of charges or a failure to try charges separately can be an irregularity within the meaning of S. 537, Criminal Procedure Code, but that Section cannot be availed of in an appeal against acquittal so as to justify the court in convicting the accused on the appeal.

Public Prosecutor v. *Maliyakkal Kadirt Koya Haji.* (*Oldfield, Seshagiri Ayyar and Napier, JJ.*) (*F. B.*) 101

———Ss. 260, 530—*Bangalore District Magistrate—European British subjects—Power to try summarily.*

The District Magistrate of Bangalore has no power to try a European British subject summarily and the trial is void under S. 530 Criminal Procedure Code.

Jeremiah In re. (*Ayling and Phillips, JJ.*) 758

———Ss. 345, 423, 1 (d), 439,—*Compounding of offence in revision before the High Court—Power of the High Court—Indian Penal Code, S. 325.*

Cr. P. Code—*Contd.* PAGE.

An offence cannot be allowed to be compounded when the matter is pending before the High Court in revision.

S. 345 of the Criminal Procedure Code, is exhaustive of the circumstances and conditions under which composition can be effected.

Emperor v. *Ram Pyari* (1909) I. L. R. 32 A. 153 not followed.

Sankar Rangayya v. *Sankar Ramayya.* (*Ayling and Tyabji, JJ.*) ... 521

——— **S. 537**—Applicability—Acquittal—Appeal against—Conviction—High Court—Jurisdiction. *See* Cr. P. C—S. 238. 101

Declaratory suit—Vizagapatam Agency—Attachment in execution—Claim preferred and allowed—Declaratory suit by decree-holder—Maintainability. *See* Right of suit 730

Decree—Execution—Application for one of reliefs open—Inference of abandonment of other reliefs if legitimate. *See* C. P. C., of 1908—Ss. 47,73 96

———For injunction in respect of easement right—Execution—Right of decree-holder—Alienation of property to which right of easement is appurtenant—Effect. *See* Execution 693

———Setting aside—Grounds of—Suit for declaration that final decree against plaintiff did not apply to him—Maintainability—Fraud—Absence of allegations as to Effect. *See* Hindu law Joint Hindu family (P. C.) 165

———Construction—Hindu. Law—Widow—Alienation of "right, title and interest"—Nature of estate conveyed—Recitals as to necessity—Effect. *See* Hindu Law—Mitakshara School 130

———Rectification—Suit for if necessary—Mistake if may be set up by defendant. *See* Evidence Act—S. 92 proviso (1) 229

———Validity—Deed drawn up for execution by all—Execution by some only—Intention of parties. *See* Trust, charitable ... 291

———Governor-in-Council—Publication in execution of duty and not exceeding it—liability for. *See* Assam Labour and Emigration Act. 280

Divorce Act (IV of 1869). Ss. 16 and 62—*Decree for Divorce by District Court—Confirmation by the High Court—Reference by Head Clerk in the absence of the Judge—Power of High Court—Jurisdiction—Practice—Evidence Act, S. 112—Proof of non-access.*

Where the Head Clerk of District Court in the absence of the District Judge made a reference to the High Court for confirmation of a decree for divorce passed by the District Judge *Held*, (by the Chief Justice and Ayling, J.) following the uniform practice of the Court that the High Court could confirm the decree after giving notice to the parties without requiring the petitioner to appear and move for confirmation.

Per Sadasiva Aiyar, J. That neither under the Act, nor under the rules framed by the High Court under S. 26, has the District Judge any power to refer a decree for divorce to the High Court for confirmation. Even if a reference by the District Judge is contemplated by the Act the High Court cannot act on a reference made by the Head Clerk.

Held also that without an application by the persons who wants the confirmation of the decree, the High Court, ought not to confirm the decree. *Forshaw* v. *Forshaw* (1909) I. L. R. 31 A. 511; followed.

The legitimacy of a child can be rebutted only by strong conclusive proof of non-access of the parents at the time the child could possibly have been conceived.

Decree Act—*Contd.* PAGE

Guda William v. *Guda Karunamma* (*Wallis, C.J. Ayling and Sadasiva Ayyar, JJ.*) 269

——**S. 20**—*Suit for declaration of the nullity of marriage—Impotency—Pleadings—Proof.*

A decree declaring a marriage null and void on the ground of impotence on the part of one of the parties is unsustainable in the absence of an express allegation that the party was impotent, *i.e.*, physically unfit for consummation both at the date of marriage and at the date of the institution of the suit, and strict proof of the same.

Dawson v. *Dawson*. (*Wallis, C. J. Sadasiva Aiyar and Srinivasa Aiyangar, JJ*) (*F. B*) 183

Easements Act S. 15—"*Peaceably and openly, enjoyed*"—*Meaning of—Verbal protests—Insufficient to prevent acquisition—Limitation Act Ss. 26, 27 not applicable where Easements Act applies—Suit, within 2 years of interruption—Other modes of acquisition not interfered with by Act.*

Per *Sadasiva Aiyar, J.* :—Under S. 15 of the Easements Act, mere verbal protests on the part of the servient owner against the enjoyment by the dominant owner are insufficient to prevent the acquisition of the easement. Ss. 26, 27 of the Limitation Act (1908) do not apply to the apply to the Madras Presidency where the Easements Act is in force.

Having regard to S. 15, Cl. (5) it is impossible to acquire a statutory prescriptive title to an easement unless and until the claim thereto has been contested in a suit.

S. 15 of the Easements Act does not interfere with other title and modes of acquisitions and therefore where a party proves that he has been enjoying a right of way for a long series of years, he acquires a right thereto independently of the statute and the limitation prescribed by S. 15 would have no application to such a case.

The meaning to the term "peaceable" is that the person claiming to be dominant owner has not resorted to force in his alleged enjoyment of the right.

Per *Bakewell, J* :—The words "peaceably and openly" indicate the manner in which the dominant owner must conduct himself in his use of enjoyment of the servient tenement; the conduct of the servient owner is immaterial except so far as it goes to show the nature of the user by the dominant owner. What is meant by those words is that the user should be *nec vi, nec clam.*

Muthu Gounden v. *Anantha Gounden.* (*Seshagiri Aiyar and Bakewell, JJ.*) 685

Ejectment Suit—*Maintainability—Defendant, a trespasser—Lease by landlord outstanding at time of suit—Effect—Practice—Appeal—Allowing new point in—Legality.*

There is no inflexible rule of law that a trespasser can refuse to give up possession to a plaintiff simply because a third party may be entitled to possession against him (the plaintiff).

Ambalavana Chetty v. *Singaravelu Udayar* (1912) M. W. N. 669 at 680 *Narayanaswami Naidu Garu* v. *Yerramalli Ramakrishnayya* (1910) I. L. R. 33 M. 499 *Bisseswri Dabeea* v. *Baroda Kanta Roy Chowdry* (1884) I. L. R. 10 C. 1076 *Sarat Chandra Sinha* v. *Nritya Gopal Biswas* (1910) 13 C. L. J. 284 followed.

Ejectment—*Contd.* PAGE.

Held, a landlord, though he has given a lease to a third person is entitled for the purpose of putting his lessee in possession, to maintain a suit to eject a trespasser. The defendant in such a suit can succeed only if he shows that the plaintiff or his lessee has no right to possession because the defendant is himself entitled to possession either through a title paramount to the plaintiff or derived from the plaintiff or his lessee or because the lessee is unwilling that the plaintiff should get possession during the term of the lease.

Ramanadan Chetty v. *Pullikutti Servai* (1898) I. L. R 21 M. 288 distinguished.

The Zemindar of Vizianagram v. *Behara Suryanarayana Pantulu* (1901) I. L. R. 25 M 587 (597) referred to.

Per Hannay, J.—The Appellate Court ought not to allow a party to rely upon a point which was not raised in the Court of First Instance and which requires an investigation into facts.

Somiammal v. *Vellaya Sethurayan* (*Sadasiva Aiyar and Hannay, JJ*)... 238

Estoppel—What amounts to. *See* Bombay City Land Revenue Act (P.C.). 299

Estoppel by Judgment—Stranger bound by Judgment passed against person he derived title subsequent thereto. *See* Judgment ... 558

Evidence—Criminal case—Depositions in—Admissibility in civil cause—Conditions. *See* Hindu Law—Adoption 34

————Documents—Non-production by one party—No application by opposite party for affidavit of such documents or for their inspection or production—Adverse inference as to contents of. *See* Benami Purchaser P. C. 335

————Secondary evidence—Admission without objection—Objection in appeal.—Maintainability. *See* Will (P. C.) 307

————Witness—Cross-examination—Contradicting or discounting evidence—Use of evidence in former case. *See* Hindu Law—Adoption... 34

Evidence Act—S. 33—Criminal case Depositions in—Admissibility in Civil Cause—Conditions. *See* Hindu Law—Adoption—Datta Homam Ceremony 34

————**S. 90**—Ancient documents—Presumption as to—Applicability to copies. *See* Malabar Law 772

————**S. 92, proviso (1)**—*Oral evidence to vary the terms of a sale-deed—Entry of wrong survey number—Fraud or mistake—Right of vendee to adduce oral evidence to prove mistake—Specific Relief Act, S. 31.*

Where in a suit to recover possession on the ground that the plaintiff purchased the property from the owners in 1911 and the defendant was in wrongful possession of it, the defendant pleaded that the same vendors conveyed to him the property in dispute in 1908 and though the conveyance in his favour described the land as survey No. 90-B., his vendors intended to sell and he intended to purchase only survey No. 92-B.

Held, that having regard to S. 92, Cl. (1) of the Evidence Act, the defence was open to the defendant being one of mistake entitling the defendant to rectification of the deed and a separate suit for the purpose was not necessary.

Rangaswami Aiyangar v. *Sowri Aiyangar*. (*Seshagiri Aiyar and Napier, JJ.*) 229

Evidence Act—*Contd.* PAGE.

——— **S. 93**—Applicability—Grant to Zemindars, etc.—Construction—Opinions and intentions of Government and its officers in Government publications—Admissibility. *See* Madras Land Encroachment Act (F. B.) 389

——— **S. 112**—Legitimacy—Presumption as to—Rebuttal—Nature of proof required. *See* Divorce Act—Ss. 16 and 62 (F. B.) ... 269

——— **S. 116**—Principle of—Landlord and tenant—Tenant let into possession—Ejectment suit after due notice to quit—Denial of pl in-tiff's title—Estoppel. *See* Ev. Act—S. 116 (P. C.) 385

——— **S. 145**—Witness—Contradiction in cross-examination—Documents—Use of—Practice. *See* H. Law—Adoption 34

Execution—*Decree for injunction—Right of easement—Transfer of property by decree-holder to third person—Transferee not on record for execution—Right of decree holder to execute the decree.*

Where a person obtains a decree for injunction in respect of an easement right and subsequently transfers the property to which the right of easement is appurtenant to a third person, so long as there is no transfer of the decree, he (the judgment-creditor) is entitled to execute the decree

Ram Sahai v. *Gaya* (1885) I. L. R., 7 A. 107. foll.

Monmotha Nath Mitter Pal v. *Rakhal Chandra Tewary* (1909) 10 C.L. J. 396.

Jasada Deye v. *Kirtibash Das* (1891) I. L. R., 18 C. 639 ; *Hansraj Pal* v. *Mukharaji* (1907) I. L. R., 30 A. 28 ; 4 A. L. J. 759 referred to.

Sillu Pedda Yelligadu v. *Raja of Pittapur.* (*Abdur Rahim and Spencer, JJ.*) 699

——— Application—Pendency—What amounts to—Grant of all reliefs prayed for—No formal order of dismissal—Effect. *See* C.P.C. of 1908 Ss. 47, 73 96

Execution Sale—Validity—Suit against Hindu widow in possession and illegitimate son—Sale of estate in execution—Binding nature of, on legatee under will of deceased—Existence of will not known to decree-holder—Purchaser a stranger—Effect. *See* C. P. C.—S. 2 cl. (11) ... 698

Executing Court—Jurisdiction—Mortgage with possession—Decree for Sale—Omission to provide for accounts of profits—Taking of accounts in execution—Expression of willingness by decree-holder to give credit for profits—Estoppel. *See* C. P. C—Or 21, R. 2 219

Grant—Agraharam—Grant subject to Meras and russums—Enforceability of meras, etc. after failure of purposes. *See* C. P. C—S. 11 Expl. ii 585

——— Construction—Grant of Village—Description of Village as Sarva or rent-free agraharam of temple—Effect. *See* Estates Land Act—S. 3 Cl. (d) 478

——— Putni lease of land—Reversionary rights in—Maintenance grants secured over land if pass by. *See* Chota-Nagpur Encumbered Estates Act (P. C.) 80

——— Inam title-deed—"Besides Poramboke" Effect of. *See* Madras Forest Act Ss. 6, 16 276

——— Crown Grant—Construction—Principle—Applicability to permanent Sanads issued to Zemindars, Inamdars, etc.—Opinions and in-

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tentions of Government and its officials in Government publications—Use of, in construing such grants—Legality—Evidence Act. S. 98. *See* Madras Land Encroachment Act (F.B.) 389

Guardian and ward—Lease in excess of powers of guardian—Repudiation by another Guardian—What amounts to—Suit to set aside lease—Necessity—Repudiation by minor on attaining age—Distinction. *See* Guardian 617

Guardian—*Lease in excess of power—Voidable—Avoidable by guardian only by suit—Avoidance in pais by ward—Lease to enure beyond minority—Not void—Deed—Construction—Grant to mother and son for mother's life and the whole to the son after—Mother appointed guardian—Clause against alienation—Construction of—Not restriction on power as guardian—Transfer of Property Act S. 10.*

The Zemindar of Ghandarvakota made a grant in favour of his wife and son the operative words of which were as follows :—"I have given to the said Madurambal this day for herself and the other person (*i.e.* the minor son) and left in her enjoyment the buildings, gardens, etc.,... I have given to the said Madurambal for the said two persons for the maintenance, clothing, etc., of the said Madurambal and Rajagopalan (the son) ". The deed was styled a settlement deed. It contains a provision that after the lifetime of Madurambal Rajagopalan should enjoy all the villages. There was also a clause prohibiting both the grantee and the grantor from alienating the property.

Held upon the construction of the grant that the mother and son took jointly as tenants in common during the mother's life-time and on her death, the son took the whole that the mother was constituted a guardian of the minor son in respect of his interest in the property and that by the clause against alienation it was not intended to restrain the powers of the mother as guardian.

Held further that the grant was not one restricted to the grantees personally so as to preclude alienation.

Held also that the clause against alienation was invalid under S. 10 of the Transfer of Property Act.

A lease by a guardian is not void merely because it is intended to enure for a period extending beyond the minority of the ward.

A lease by a guardian in excess of his powers is only voidable and as such could not be pleaded by the tenants as a bar to the suit but the lessee for rent against them.

When one guardian whether natural or appointed has given a lease another guardian (in this case the father after the death of the mother) could not by an act of his own repudiate the lease or put an end to it. The only course open to him is to sue to set it aside.

Semble. The minor himself may on attaining age put an end to it by an unequivocal act repudiating the transaction without resorting to a suit.

The lessee's title is perfected by the execution of the lease and the fact that he has not taken possession is immaterial except in so far as it may show that the lease was not intended to be a real transaction.

Guardian—*Contd.* PAGE.

In suits instituted after the coming into force of the Estates Land Act, the non-tender of proper pattas is no bar to the suit, though the claim is in respect of faslis prior to the Act.

Muthukumara Chetty v. *Anthony Udayan.* (*Sadasiva Aiyar and Spencer, JJ.*) 617

High Court—Bench disposing of Criminal Work—Admission Court disposing of Criminal Work—Appeal—Power of Bench to entertain—Practice. *See* Cr. P. C. S. 233 101

Highway—*Processions in—Right to carry—Interference with right—Order of Magistrate prohibiting procession—Suit by aggrieved party for declaration and injunction—Maintainability—Special damage—Proof of—Necessity—C. P. C. of 1908—O. 1, R. 8,—Sanction under, obtained subsequent to suit—Validity*

Every citizen has a natural right to conduct religious processions through the public streets Though this right may be restricted in the interests of public safety, or its exercise may be limited so that it may not infringe the rights of property possessed by others, the burden will lie upon those who claim to impose fetters upon the exercise of such rights to establish the limitation.

Sundaram v. *The Queen*: *Ponnusami* v. *The Queen* (1883) I. L. R. 6 M. 203. *Parthasaradhi* v. *Chinna Krishna* (1882) I. L. R. 5 M. 304, *Sadagopachariar* v. *Rama Rao* (1902) I. L. R. 26 M. 376 on appeal 39 M. 185 P. C. referred to.

The right of every citizen to pass through public streets in procession is a civil right.

Vibudariya Thirthaswamy v. *Esoof Sahib* (1910) I. L. R. 35 M. 28 followed; *Kandasami Mudali* v. *Subroya Mudali* (1909) I. L. R. 32 M. 478 referred to.

Where a suit was instituted by four persons claiming to be headmen of the Pallar community of a village for a declaration of their right to go in procession through certain public streets of the village on some specific occasions and for an injunction restraining the defendants, the Hindu inhabitants of the village, who had obtained an order from the Magistrate against plaintiff's passing in procession, from interfering with the exercise of the plaintiff's rights, and the suit was resisted on the grounds, amongst others, that the rights claimed were not of a civil nature and that the suit was not maintainable because there was no allegation of special damage; *held*, that (1) the suit was of a civil nature, (2) the plaint as framed disclosed a cause of action and it was not necessary to allege or prove any special damage, (3) that the suit was maintainable, even though the plaintiff would have a remedy in the Criminal Courts on the facts alleged, and (4) that the case was a fit one for the grant of an injunction.

A suit instituted without obtaining sanction under O. 1, R. 8, of the Code of Civil Procedure, 1908, can be validated by such sanction subsequently obtained.

Even in cases where an actual offence is threatened it is not the law that recourse must be had to the Criminal Courts, before seeking redress in the Civil Courts. ... ...

Andi Moopan v. *Muthuveera Reddy.* (*Seshagiri Aiyar and Kumarasami Sastri, JJ*). 91

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Hindu Law—Authorities on— Relative Values of —Smriti Chandrika Subodhini, Mitakshara. See Hindu Law—Mitakshara Law—P. C.... 431

——— *Adoption*—Datta Homam *ceremony, when necessary—Will—Trustees—Want of consent of one of five trustees—Eject—Evidence Act, Ss.* 33, 145—*Depositions in other cases, when and how to be used—Documents, use of, to contradict witness—Practice—Pleadings—Fraud, undue influence and coercion—General allegations insufficient—English and Indian Law.*

Under the Hindu Law, the performance of the ceremony of *Datta Homam* is not essential to the legal validity of an adoption among Brahmins where the child to be adopted belongs to the same *Gotra* as that of the adoptive father.

Valubhai v. *Govind Kashinath* (1899) I. L. R. 24 B. 218 approved.

Govindayyan v. *Dorasami* (1884) I. L. R. 11 M. 5 referred to.

Where a Hindu testator authorised his widow to adopt a son to him with the consent of five trustees whom he had appointed under his will. Held, that the consent of a trustee who declined to act was unnecessary to validate an adoption by the widow.

Quaere: Whether the consent of the majority of the trustees was not enough to validate the adoption?

A civil cause must be judged of by the evidence let therein and depositions in a criminal case must not be imported in bulk into another case in the absence of the circumstances specified in S. 33 of the Evidence Act.

Evidence given in a former case should not be used for the purpose of either contradicting or discounting the evidence of the witnesses in a suit, unless the particular matter or point has been placed before the witness as one for explanation in view of its discrepancy with the evidence then being tendered.

Under S. 145 of the Evidence Act, if a witness is under cross-examination on oath, he should be given the opportunity, if documents are to be used against him, to tender his explanation and to clear up the particular point of ambiguity or dispute. The duty of enforcing this rule is all the more imperative where a witness's reputation and character are at stake.

Under the Contract Law of India, as well as under the English Law, coercion, undue influence, fraud and misrepresentation are all separate and separable categories and must be alleged with sufficient particularity.

Gupta v. *Tiluckram Chowdhry* (1888) I. L. R. 15 I. A. 119 referred to.

Bal Gangadhar Tilak v. *Shri Shriniwas Pandit* (*Lord Shaw*) P.C. 84

——— *Adoption—Authority to adopt a specified person—Death of the son so adopted—Whether authority to make a second adoption could be inferred.*

Where by the will of her deceased husband, a Hindu widow was directed to adopt a specified person, and the boy so adopted died.

Held, per Sankaran Nair, J., that under the authority so given, the widow could make a second adoption on the death of the first adopted son.

If the intention of the husband that he should be represented by an adopted son is clearly expressed in the will, the adoption should be up-

Hindu Law—*Contd.* PAGE.

held unless there is anything in the will to show that a second adoption should not be made.

Per Oldfield, J. The authority being only for the adoption of a specified person, authority for a second adoption could not be inferred.

Chenga Reddi v. Vasudeva Reddi (Sankaran Nair and Oldfi ld, JJ.) 144

—— —*Adoption—Widow adopting her brother's son under authority from her husband—Validity—Test of eligibility—Rule of Nanda Pandita —Subordinate Courts, duty of, to follow rulings of the High Court.*

The rule laid down by Nanda Pandita that a widow cannot lawfully adopt her brother's son or grandson is an extension of the rule of Hindu Law that no one can be adopted as a son whose mother the adopter could not have legally married, which is not supported by authority and cannot therefore be regarded as law.

An adoption by the widow is not an adoption to her but one to her deceased husband; the test of eligibility of the adopted son for adoption must, therefore be the test which would have applied had the adoption been made by the husband himself during his life time.

The rule of Hindu Law that a legal marriage must have been possible between the adopter and the mother of the adopted boy only refers to their relationship prior to marriage.

Held, accordingly that where a Hindu widow adopted her brother's son in pursuance of the authority given by her deceased husband, the adoption was valid.

Jai Singh Pal Singh v. *Bijai Singh* (1905) I. L. R. 27 A. 17.

Sri Ramulu v. *Ramayya* (1881) I. L. R. 3 M. 15 *Bai Nani* v. *Chuni Lal* (1897) I. L. R. 22 B. 978 referred to

The Judge of a Subordinate Court in India is bound to follow the decision in law of a bench of the High Court to which he is Subordinate unless the decision of the Bench has been overruled by a decision of a Full Bench of that Court or by the Privy Council or unless the law has been altered by a subsequent Act of the Legislature.

Puttu Lal v. Mussammat Parbati Kunwar (Sir John Edge) (P. C.) 63

——*Adoption—Co-widows—Preferential right of senior widow—Adoption by junior widow without consent of senior widow, though with consent of sapindas—Invalidity of.* ... ...

Where a Hindu dies sonless leaving more than one widow, the preferential right to adopt (with the consent of the sapindas) vests with the senior among them and an adoption made by the junior widow without the consent of the senior widow, though with the consent of the sapindas, is invalid. ... ...

Kakerla Chukkamma v. *Kakerla Punnamma* (1914) 28 M. L. J. 72. *Padaji Rao* v. *Rama Rao* (1888) I. L. R. 13 B. 160 followed. *Rakma Bai* v. *Radha Bai* (1868) 5 B. H. C. R. A. C. J. 181 and *Ranjit Lal Karmakar* v. *Bijoy Krishna Karmakar* (1912) I. L. R. 39 C. 582 referred to ...

Per Chief Justice.—The senior widow is one of the 'kindred' whom it is the duty of the junior widow to consult, with reference to an adoption. The *Ramnad case* (1868) 12 M. I. A. 397 referred to. ... ...

Rajah Damara Kumar Venkatappa Nayanim Varu v. *Damara Ranga Rao Varu.* (*Wallis, C. J. and Coutts-Trotter, J.*) 18

——Grant—Construction—Grant to mother and son for mother's life and after her death to son absolutely—Nature of estates taken—

Hindu Law—*Contd.* PAGE

Clause against alienation—Alienation by mother as guardian appointed under grant—Validity. *See* Guardian 617

———Impartible Estate—Succession to—Right of females—Custom—Last holder a divided member—Competition between widow and divided brother. *See* H. Law—Mitakshara (P. C.) 371

———*Joint Family—Partition—Agreement that the property of one of the brothers dying without male issue, should go by survivorship to others—Validity—Transfer of Property Act, S. 6 (a).*

A provision in a partition-deed between four brothers that in the event of the death of any one of them without male issue, his share of the joint family properties after deducting any alienations made by him should be divided among the surviving brothers is valid, and is neither in contravention of Hindu Law nor obnoxious to the provisions of S. 6(a) of the Transfer of Property Act.

Kanti Chandra Mukerji v. *Ali Nabi* (1909) I.L.R. 33 A. 414 followed.

Muthuraman Chettiar v. *Ponnusamy Udayar* (*Wallis, C. J. and Seshagiri Aiyar, J.*) 214

———*Joint family—Partition—Unambiguous expression of intention by one member—Suing for partition—Effects a severence of joint family.*

A member of a Mitakshara joint Hindu family becomes separated from the other members by the mere fact of suing them for partition *Suraj Narain* v. *Iqbal Narain* (1912) I. L. R. 35 A. 80 at p. 87, followed.

Per *Sadasiva Aiyar J.* A member of a joint family who sells away his share in all the coparcenary properties becomes severed from the joint family and the alienee becomes a tenant-in-common with the other co-parceners in respect of the share so alienated.

Aiyyagiri Venkataramayya v. *Aiyyagiri Ramayya* (1902) I. L R. 25 M. 690. *Chinnu Pillai* v. *Kalimuthu Chetti* (1911) I. L. R. 35 M. 47 at p. 59, s. c. 21 M. L. J. 246. *Doraisawmi* v. *Nondisawmi* (1911) 21 M. L. J. 1041. *Subba Rao* v. *Ananthanarayana Aiyar* (1912) 23 M. L. J. 64. approved.

Nanjaya Mudali v. *Shanmuga Mudali* (1913) 26 M. L. J. 576. *Ganesh Row* v. *Tulja Ram Row* (1913) 26 M. L. J. 460. *Maharaja of Bobbili* v. *Venkataramanjulu Naidu* (1914) 27 M. L. J. 409. dissented from.

———Partition—Decree for—Provision for marriage expenses in whose favour can be made. *See* Hindu Law, Inheritance 710

———*Inheritance—Sudras—Share of adopted son in competition with aurasa son—Partition decree—Provision for marriage expenses.*

Under Hindu Law even among Sudras the adopted son in competition with a subsequently born aurasa son is entitled to only one fifth of the estate.

Rajah v. *Subbaraya* (1883) I. L. R 7 M. 268 not followed.

In partition decrees provision can be made for the marriage expenses of the unmarried members of the family. Such a provision should be made only for persons who are of the same degree of relationship as those who have been married at the expense of the family.

Srinivasa Iyengar v. *Thiruvengada Iyengar* (1913) 25 M. L. J. 644; 15 M. L. T. 307 followed.

Karuturi Gopalan v. *Karuturi Venkataraghavalu* (*Wallis, C. J. and Seshagiri Aiyar, J.*) 710

Hindu Law—*Contd.* PAGE.

————Inheritance—Mithakshara School—Spiritual benefit—Doctrine of—Applicability. *See* Hindu Law—Mithakshara Law (P. C.) ... 431

————*Mitakshara—Inheritance—Impartible Estate—Division between brothers—No division of the impartible estate—Widow's right to inherit notwithstanding—Custom—General law, applicability of, where not superseded.*

There is no inconsistency between impartibility and the right of females to inherit and the widow of the last holder of an impartible estate is entitled to succeed if her husband was in fact separated and died without male issue unless a custom to exclude her from succession is proved.

Where a custom is proved to exist, it supersedes the general law which however still regulates all outside the custom.

It is not correct to say that there could be no complete separation without the ancestral impartible estate held by one of the members also being divided. The other members have no co-parcenary rights in the impartible estate and their contingent interest under the custom is liable to be defeated by an alienation of the estate by the holder for the time being even if the family remains joint and when the family ceases to be joint the ordinary law of the Mitakshara gives the widow an estate in priority to the contingent interest of the other members under the custom.

Where the holder of an impartible estate dissatisfied with the conduct of his undivided brother granted him a mokurari patta of a portion of the estate for the maintenance of himself and his descendants and the atter built a separate house for himself though adjoining the family residence and was separate in mess and worship and defraying the expenses of the marriages, etc., of his descendants himself.

Held, that the brothers were divided in status and the widow was entitled to succeed in preference to the brother and his descendants.

Neelkisto Deb Burmono v. *Beerchunder Thakoor* (1868) 12 M. I.A. 523 and *Ram Nundun Singh* v. *Maharani Janki Koer* (1902) L. R. 29 I. A. 178 *approved.*

Thakurani Tara Kumari v. *Chaturbhuj Narayan Singh* (Sir John Edge) P. C. 371

————*Mitakshara school—Cousin of full blood and paternal uncle of half blood—Mortgage—Joint Decree under Transfer of Property Act of* 1882, *Ss.* 88 *and* 89—*Application for execution—Reservation in favour of joint-decree holder—Auction sale—Purchase by one of co-mortgagees—S.* 317 *of Civil Procedure Code of* 1882—*Fraud.*

Where two persons A and B jointly advanced money on a mortgage and obtained a decree for sale but only one of them applied for execution (expressly reserving however, the rights of the other) and purchased the property in his own name.

Held, that S. 317 of the Civil Procedure Code of 1882 which was only designed to check benami purchases in the interests of judgment-debtors, in no way affected the title of persons otherwise beneficially interested in the purchase and that the Courts in India were perfectly right in refusing to allow the defendant to perpetuate a fraud against the plaintiff his co-decree-holder who was entitled to share in the properties purchased, to the extent of his interest in the joint decree.

Hindu Law—*Contd.* PAGE.

Boodh Singh Doodhini v. *Gunesh Chunder Sen* (874) 12 *Beng L. R.* 317 (*P. C*) approved.

The preference of whole blood to half blood under the Mitakshara applied only to sapindas of the same degree of descent from the common ancestor and did not apply to persons of different degrees.

Held, accordingly that an uncle of the half blood was entitled to succeed in preference to an uncle's son of the full blood.

Suba Singh v. *Sarfras Kunwar* (1896) I. L. R. 19 A. 215 approved.

Ganga Sahai v. *Kesri*. (Mr. Syed Ameer Ali) (P. C.) 329

———*Mitakshara Law—Benares School—Paternal uncle's grandson and father's paternal uncle's son—Priority of former—Putra and synonymous terms used with brothers and uncles—Use in generic sense to be understood—Capacity to offer oblations—Ground of preference—Smriti Chandrika—Value in determining meaning of Mitakshara—Subodhini—Authority of—Harrington's view—Reference to—Full Bench when difference of opinion—Taking opinion of Judge not party to judgment.*

In the Mitakshara as expounded in the Benares School, the word Putra and its synonyms employed by Vijnaneswara in connection with brothers and uncles must be understood in a generic sense as in the case of the deceased owner and the descendants in each ascending line up to the fixed limit should be exhausted at any rate to the *third* degree before making the ascent to the line next in order of succession.

Under the Mitakshara (as interpreted by Mitramisra) whilst the right of inheritance arises from sapinda relationship or community of blood, in judging of the nearness of blood relationship propinquity among the gotraja, the test to be applied to discover the preferential heir is the capacity to offer oblations.

Bhyah Ram Singh v. *Bhyah Ugur Singh* (1870) 13 M I. A. 372 followed.

Held, accordingly, that the paternal uncle's grandson was a preferential heir to the father's paternal uncle's son.

Devananda Bhatta, the author of the Smriti Chandrika, admittedly differs from the author of the Mitakshara in several essential rules of law and it is doubtful whether an enunciation in the Smriti Chandrika can be safely applied, except perhaps by way of ananiogy, to explain a dubious or indeterminate phrase or term in the Mitakshara.

No canonical authority can be attached to the rule laid down by Subodhini.

Quaere : If Harrington's view with the regard to the continuation of each line of heirs to the seventh degree can be accepted as it contravenes the rule of Manu.

It is usual where a difference of opinion arises in the same court to refer the point to a Full Bench and the law provides for such contingencies.

It is undesirable to introduce the opinion of a learned Judge who is not a party to the judgment for the purpose of enforcing the conclusion arrived at.

Buddha Singh v. *Laltu Singh*. (Mr. Syed Ameer Ali) P. C. 431

———*Joint Hindu family—Manager—Mortgage-suit—Decree—Set aside against some—Insufficient service—Another suit—Two decrees—Merger—S. 108 of C P.C. of 1882—Suit to set aside decree—Fraud.*

Hindu Law—*Contd.* **PAGE.**

In 1884 one Prag Dat Pande, the manager of a joint Hindu family executed a mortgage of certain family property. In 1897 the mortgagee brought a suit for the enforcement of his mortgagee against *inter alia*, two sons of Prag Dat *viz.* Bhagwant and Rajwant, and a decree was passed *ex parte* on April 30, 1897 which was made absolute on September 22, 1900. In 1901 Bhagwant and his two sons obtained an order under S. 108 of Civil Procedure Code of 1882 by which the decree passed against them in 1897 was set aside on the ground of insufficient service, but it remained in force against Rajwant. On Sept. 22, 1902 a comprehensive decree was passed against Bhagwant and all other including Rajwant. Proceedings for execution were instituted in 1903 on the first decree of 1897. In 1906 when it was sought to make the decree of Sept. 1902 absolute, Rajwant objected to it and nevertheless the decree was made absolute In a suit brought by Rajwant to set aside the decree on the same grounds.

Held, that the only ground on which a decree could be set aside was fraud practised on the Court and in the absence of all averments of fraud, the action which was merely one for a declaration that a decree to which the plaintiff was a party and which he had allowed to become final did not apply to him was incompetent.

A challenge of the method of the exercise of the jurisdiction of a Court can never in law justify denial of the existence of such jurisdiction.

Rajwant Prasad Pande v. *Mahant Ram Ratan Ram Gir* (*Lord Shaw*) (P. C.) 165

———*Illegitimate son of Sudra—By continously and exclusively kept concubine—Dancing girl and prostitute—Right to succeed to joint family property.*

The illegitimate son of a Nattukottai Chetti by a woman kept continuously and exclusively by him who was a dancing girl and following the profession of a prostitute before she came into his keeping, is entitled to succeed.

Sundrarajam v. *Arunachalam Chetty.* (*Chief Justice, Justice Ayling and Sadasiva Aiyar, J.*) 798

———*Mitakshara School—Widow's estate—Alienation—Reversioner—Right, title and interest of the widow conveyed—Effect of—Recital of necessity—Deed—Construction—Absolute estate conveyed.*

Where a Hindu widow alienated property belonging to her husband's estate for binding purposes of necessity but she purported to convey only her own "right, title and interest" in the property though the recitals of necessity and the statement that thereafter the transferee should enjoy the property as full owner showed that what was intended to be conveyed by those terms was the absolute interest and not merely the widow's estate.

Held, that those words were consistent with the passing of the larger nterest and the purchaser took an absolute estate.

Hunooman Pershal Panday v. *Musammat Munraj Kooynwar* (1856) 6 M. I. A. 398, 411-12. approved.

Thakur Vasonji Morarji v. *Mussammat Chanda Bibi* (*Lord Atkinson*) (*P. C.*) 130

———*Widow—Alienation—Alienation attacked as being nominal by ttaching decree-holder who has obtained decree against widow for debt of her husband—Alienation for no necessity—Onus of proof—Distina-*

Hindu Law—*Contd.* PAGE.

tion—Attachment of reversionary interest left in Hindu widow after invalid alienation by her—Validity of.

Where a Hindu widow sold certain property of her husband and subsequently the plaintiff obtained a decree against her for a debt due by her husband, attached the said property in execution, and, on the attachment being raised at the instance of the alienee, sued for a declaration that the sale was nominal or without consideration, that it was in any event not for necessity, and that the property was liable to be attached in execution, *held* that

(1) the onus of proving that the sale was nominal or without consideration lay upon the plaintiff, while the onus of proving that it was binding on the reversion lay on the alienee,

(2) if the sale was real but was not binding on the reversion, the plaintiff was entitled to attach and to bring to sale the reversionary interest in the property remaining in the widow after such alienation.

Segu Chidambaramma. v. *Sareddi Hussainamma.* (*Sadasiva Aiyar and Tyabji JJ*). 546

———*Widow—Alienation by—Debts of husband, existence of—Imprudent transaction—Absence of good faith—Right of alienee to improvements.*

Where a Hindu widow sells immovable properties of her husband for a low price for debts incurred by her husband on a mortgage of those properties which are being gradually wiped out from the usufruct, and the widow's real object was to got some ready cash into her hands and the alienees were not ignorant of the widow's real object, the alienation is invalid against the reversioners.

The existence of a debt due by the husband's estate on the date of the sale, does not entitle the widow to sell away a portion of the property, if the sale would be imprudent.

A wholly imprudent alienation made by a widow not with the religious motive of freeing her husband's soul in his after-death-state from the burden of his debts, but with a view to get some ready cash into her hands cannot be supported as against the reversioners.

An alienee under such an alienation, who is not a *bona fide* alienee is not entitled to claim improvements.

Nanjappa Gounden v. *Peruma Gounden* (1809) I. L R. 32 M. 530 : 19 M. L. J. 454 followed.

Kidar Nath v. *Mathu Mal* (1913) I. L. R. 40 C. 555 : 25 M. L. J. 176 P. C. distinguished.

Muddusami Siddapa v. *Bhaskara Lakshmi Narasappa*, (*Sadasiva Aiyar and Phillips, JJ.*) 357

———*Widow—Compromise—Construction—"Absolute rights for food and clothing"—Nature of property taken—Registration Act S. 17, 49—Decree—Incorporation of terms of compromise though not in operative part of decree.*

Where, in a suit brought by the plaintiff's adoptive father to declare a certain alienation purporting to be on behalf of his minor daughter-in-law was invalid, a compromise was arrived at by which the defendant, his daughter-in-law who had claimed half under an award was given a ¼th of the properties "with absolute rights" towards her food and clothing charges

Hindu Law—*Contd.* PAGE.
and the plaintiff's father the remainder and neither was to have any right nor interest in the property allotted to the other.

Held, that upon a proper construction of the compromise, the daughter-in-law took an absolute estate in the properties allotted to her.

Held also that the compromise did not require registration, the court having sanctioned the compromise on behalf of the minor defendant (daughter-in-law) and practically incorporated the terms of the compromise on the decree though the operative part of the decree only purported to dismiss the suit.

Sankaravelu Pillay v. *Muthusawmy Pillay* (*Ayling and Tyabji, JJ*). 779

——— *Widow—Right to maintenance—Unchastity—Reformation at time of suit—Maintenance secured by instrument—Effect of.*

Where in a suit brought by a Hindu widow against her deceased husband's brother for maintenance, the amount of which had been fixed by agreement it was found that, after the date of the agreement, the plaintiff had led an immoral life but that, at the time of the suit, she had reformed her ways and was living with her people:

Held, that the plaintiff was not entitled to the rate of maintenance provided in the document but was entitled to a starving allowance.

Nagamma v. *Virabadra* (1894) I. L. R. 17 M. 392, *Kandasami Pillai* v. *Murugammal* (1895) I. L. R. 19 M. 6, distinguished.

S. A. No. 725 of 1912 followed.

Sathyabhama v. *Kesavacharya* (*Ayling and Seshagiri Aiyar, JJ*) ... 87

———Will—Construction—English rule as to selection—Applicability—Uncertainty of bequest—What amounts to. *See* Will—Construction ... 717

———Will—Construction—Residuary clause—Fund existence of which unknown to testator—Devolution of—Release by natural heir of right to fund—Release under mistake—Effect. *See* Will — Residuary legatee 682

Interest—Award of—Legality—Kanom deed—Absence of provisions for interest on arrears—Effect. *See* Malabar Law 772

Judgment—*Estoppel by—Rendition of in the presence of all the parties interested—Binding effect of on parties whose title is later in origin —Nullity, only ground of attack—Absolute want of jurisdiction over parties or subject matter—Religious Office—Custom of alienability—Limitation—Act. Art. 124—Possession of Emoluments without performing duties—Not adverse possession within.*

Where a link in the chain of a party's title consists of a decree of a court of competent jurisdiction pronounced against the only person or persons who at the time of such decree had any interest which would entitle them to resist the plaintiff's title, no person whose claim is subsequent in origin can challenge that decree, or go behind it or challenge the plaintiff's title as at that date on any ground which was determined by that decree as a necessary step in its result.

Per Srinivasa Aiyangar, J. It is open, however, to such party to show that the judgment is a nullity but the only ground on which a judgment as distinguished from a conveyance, can be declared a nullity is the want of jurisdiction in the court over the parties or the subject-matter.

A judgment rendered after trial recognising the alienation of an office in the presence of all the parties interested in questioning the same cannot

Judgment—*Contd.* PAGE.

be questioned by a stranger on the ground that such alienation is against public policy.

Quaere, if compromise decrees stand on a different footing *Lakshmanaswami Naidu* v. *Rangamma* (1902) I. L. R. 26 M. 31 doubted.

Obiter. The weight of authority is against the view that no custom of alienability of a religious office should be recognised.

Per Curiam. Mere possession of the properties attached to an office without performing the duties of the office is not adverse possession of the office within the meaning of Art 124 *Kamalathammal* v. *Krishna Pillay* (1910) 20 M. L. J. 781 followed.

Suppa Bhattar v. *Suppu Sokkaya Bhattar*. (*Coutts Trotter and Srinivasa Aiyangar, JJ.*) 558

Jurisdiction—Municipal Courts—Act of State—Annexation of territory—Obligation assumed under—Enforcement of. *See* Act of State (P. C.) 242

————Objection to—Wavier—What amounts to. *See* C. P. C.—S 86. 667

————Existence of—Denial—What amounts to—Challenge of method of exercise of jurisdiction. *See* Hindu Law—Joint Hindu family (P. C.) 165

Keeping alive—Doctrine of—Applicability—Absence of mesne incumbrances—Effect. *See* T. P. Act—S. 101 583

Landlord and tenant—*Mulgeni Lease—Trees, right of tenant to cut and appropriate—Extent of the right.*

In the absence of a prohibition in the lease, a Mulgeni tenant is entitled to cut and appropriate the trees on the holding, whether planted by him or of spontaneous growth, so long as the trees growing on the land at the date of the lease are not interfered with and the nature of the holding is not changed.

Gangamma v. *Bhommakka* (1909) I. L R. 33 M. 253, *Vasudevan Numbudripad* v. *Valia Chathu Achan* (1898) I. L. R. 24 M. 47 (F. B.) referred to.

Krishnacharya v. *Anthakki*. (*Spencer and Kumarasami Sastri, JJ*). 314

————Meras and Russums—Grant of Agraharam subject to—Enforceability of meras and russums after failure of purposes. *See* C. P. C.—S. 11 Expl. ii. 585

————*Permanent lease—Forfeiture for non-payment of rent—Lease-deed providing for days of grace—Effect—Court's power to relieve against.*

Courts have power to relieve against forfeiture even when there is a period of grace allowed in the lease deed.

Per *Napier, J.* (*Seshagiri Aiyar, J.* contra): it is not permissible to ook to the provisions of the Transfer of Property Act for guidance in this matter as they are expressly made inapplicable to agricultural leases.

Appayya Shetty v *Mahammade Beari* (*Seshagiri Aiyar and Napier, JJ*) 381

————Mulgeni lease—Relinquishment—What amounts to—Prohibition against alienation—Alienation—Forfeiture. *See* Mulgeni ... 452

————Voluntary payments—Kanganam and Kulavettu. *See* Madras Rent Recovery Act 746

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Letters Patent (Madras) cls. 10 and 39 — *Order in disciplinary proceedings under cl. 10—Leave to appeal to Privy Council, if may be given.*

An order of the High Court in the exercise of its disciplinary jurisdiction under cl. 10 of the Letters Patent in not governed by cl. 39 and therefore against such an order no leave to appeal to the Privy Conncil can be given.

In the matter of an Attorney (1914) I.L.R. 41 C. 734, followed *G. S. D.* v. *Govt. Pleader* (1907) I. L. R. 37 B. 106, *Tetley* v. *Jai Shankar* (1878) I. L. R. 1 A. 727. referred to.

In the matter of a High Court Vakil, (Wallis, C. J., Sankaran Nair and Oldfield, JJ) 16

——Lease for term—Renewal—Right to—Proof—Onus—Quantum—Prior renewals out of grace—Effect. *See* Act of State (P.C.) ... 242

——Trespass before expiry of term—Ejectment suit by lessor—Maintainability. *See* Ejectment suit 238

Letters Patent (Madras) cl. 15—*'Judgment'—Order of a single judge refusing to interfere under S. 115 C. P. Code—Appealability.*

An order of a single Judge of the High Court declining to interfere in revision under S. 115 of the C. P. Code is one passed in the exercise of the 'appellate jurisdiction' of the Court within the meaning of S. 15 of the High Courts Act and is therefore a 'judgment' within cl. 15 of the Letters Patent. It is, therefore, appealable though no records were called for, or notice issued to the other side before the order was made

Obiter: The Appellate Court, however, will not ordinarily interfere with the order of the single judge in matters of discretion.

Chappan v. *Moidin Kutti* (1898) I. L. R. 22 M. 68. *Tuljaram Rao* v. *Alagappa Chettiar* (1910) I. L. R. 35 M. 1=21 M.L.J. 1 followed, *Venkatarama Iyer* v. *Madalai Ammal* (1900) I. L. R. 23 M. 169, *Puthukudi Abdu* v. *Puvakka Kunhi Kutti* (1903) I. L. R. 27 M. 341, overruled.

Srinivasa Iyengar v. *Ramaswami Chettiar. (Wallis, C. J., Seshagiri Aiyar and Kumarasami Sastri, JJ.)* (F.B.) 12

Limitation Act, S. 14—*Withdrawal by party—Not covered by.*

S. 14 of the Limitation Act has no application where the previous suit was not dismissed by the tribunal before which it was instituted but was voluntarily withdrawn by the party himself on the discovery of a technical defect which would have involved a failure of the suit.

Arunachallam Chettiar v. *Lakshmana Aiyar. (Coutts-Trotter and Phillips, JJ).* 569

——Applicability—Provincial Insolvency Act—Cases under. *See* Provincial Insolvency Act 451

——**Of 1908—Ss. 26, 27**—Applicability to cases in which Easements Act. *See* Easements Act—S. 15 685

——**Arts. 31, 49 and 115**—Applicability—Carrier—Suit for compensation against—Suit for return of specific movable against—Limitation. *See* C. P. C.—Or. 21, R. 31 (F. B.)... 842

——**Art. 115**—Conveyance—Covenant for title—Breach—Suit for damages—Limitation—Cause of action. *See* Tr. of P. Act—S. 55 (2) 454

——**Art. 120**—Declaratory suit based on denial of title—Limitation—Cause of action—Knowledge of denial—Some of plaintiffs having knowledge more than 6 years before suit—Effect—Discretion of court. *See* C. P. C.—Or. 22, R. 9 574

Limitation—*Contd.* PAGE.

———**Art. 124**—Office—Adverse possession of—What amounts to—Possession of properties attached to office without performing its duties—Effect. *See* Judgment 558

———**Art. 120**—*Decree against father—Suit for declaration that decree binding against sons—Amendment of plaint—Addition of prayer for direction for payment against sons more than 6 years after date of decree—Effect of—Practice—Amendment.*

Where the plaint as originally presented asked merely for a declaration that a decree obtained by the plaintiff against the defendants' father was binding on them but subsequently a prayer was allowed to be added by way of amendment of the plaint seeking for a direction to the defendants to pay the amount of the decree.

Held, that the suit was not barred though at the date of the amendment more than 6 years had elapsed from the date of the decree.

Venkata Perumal v. *Velagudha Reddi* (1914) 27 M. L. J. 27 and *Weldon* v. *Neal* (1887) 19 Q. B. D. 394 considered.

Sevugan Chetti v. *Krishna Aiyangar* (1911) I. L. R., 36 M. 378 followed.

Narayana Chettiar v. *Rathnasabapathi Aiyar.* (*Ayling and Tyabji, JJ.*) 464

———**Arts. 132,144**—*Adverse possession—Mortgagor—Simple mortgage—Dispossession of mortgagor after mortgage—Not adverse to mortgagee.*

The possession of a trespasser dispossessing the mortgagor (the mortgage being simple) is not adverse to the mortgagee and does not affect his rights.

Parthasarathy Naicken v. *Lakshmana Naicken* (1910) I. L. R. 35 M. 281=21 M. L. J. 467 followed. *Ramasami Chetti* v. *Ponna Padayachi* (1910) I. L. R., 36 M. 97=21 M. L. J. 397 overruled.

Vyapuri v. *Sonamma Boi Ammani.* (*Wallis, C.J.; Sadasiva Aiyar and Srinivasa Aiyangar, JJ.*) (*F.B.*) 465

Madras-District Municipalities Act (IV of 1884), S. 250 (*a*)—*Rules framed thereunder—Election—Refusal of Chairman to register name of certain person as entitled to vote on behalf of a firm—Damages for improper refusal—Absence of* bona fides—*Malice if necessary.*

The Chairman of a Municipality will be liable in damages if he refuses to register the name of a person as entitled to vote on behalf of a firm if the refusal is not in good faith which implies due care and diligence. Express malice is not necessary.

A summary dismissal of a petition presented for the registry of the name of a person as a voter is illegal and is not consistent with *bona fides* on the part of the officer.

The nomination of a representative does not necessarily constitute an amendment of the register of votes.

Draviam Pillai v. *Cruz Fernandez* (*Ayling and Seshagiri Aiyar, JJ.*)... 704

———*Estates Land Act—Lessee of Estate—Expiry of lease—Right to attach and sell ryot's holding—Right to attach movables—Landholder—Applicability of the term to—First charge—Not available.*

The lessee of an estate to whom arrears of rent are due cannot attach and sell the holding of the ryot under the Estates Land Act after the expiry of his lease.

Madras Act—*Contd.* PAGE.

Forbes v. *Maharaj. Bahadur Singh* (1914) I. L. R. 41 C. 926 27 M. L. J. 4, referred to.

Per Spencer, J:—His only remedy is to sue the tenants on their contract to pay rent. *Per Seshagiri Aiyar, J.*:—

1. A person to whom arrears are due is a landholder notwithstanding the fact that his estate has terminated (Spencer, J. *contra*).

2. The law does not give him a first charge on the holding.

3. He can distrain the movable property or the trees in the holding of the defaulter (Spencer, J *contra*)

Sundaram Iyer v. *Kulathu Aiyar*. (*Spencer and Seshagiri Aiyar, JJ.*) ... 505

———Rent suit after, in respect of faslis prior to act—Maintainability —Non-tender of pattas—Effect. *See* Guardian 617

———"Landholder"—Meaning—Person to whom arrears are due—Termination of estate—Effect. *See* Madras Estates Land Act—Lessee of estate 505

———**S 3 Cl (d)**—"*Whole Inam Village*"—"*Minor inams*"—*Distinguished—Existence of latter in Village immaterial—*"*Sarva Inam of the temple—Village described as—Meaning of—Jeroyati*"—"*Mamool Wet*". —*Inconsistent with being old waste*

The object of the definition in Sub-S. 2 Cl (d) of S. 3 is to exclude from the definition of "Estate". "minor inams" *i.e.*, grants of particular extents of land in a particular village as contrasted with "whole Inam Villages" or grants of whole villages by their boundaries. A whole village inam does not become the less so because there are some minor inams in the village.

Where a village is described as Sarva or rent free agraharam of a temple, the obvious inference is that the whole village has been granted to the temple.

The description as "Jeroyati and mamool wet" is inconsistent with the land being old waste.

Narayanasami Naidu Garu v. *Subrahmanyam* (*Wallis, C. J. and Srinivasa Aiyangar, J*) 478

———**Estates Land Act, S. 3 sub-s. 7 (1)**—*Old waste—Period of not less than 10 years—Need not precede the letting—S. 153, 157, 163—Tenant of old waste—One year's lease given before the Act—Ejectment on the ground of—Expiry of the lease—Maintainability of—Revenue Court or Civil Court—Jurisdiction.*

The period of ten years referred to in the difinition of old waste in S. 3, sub-sec. 7 cl. (1) Estates Land Act need not immediately precede the letting in question, but may precede some prior letting within 20 years before the passing of the Act.

Per Oldfield, J.:—An action in ejectment may be brought in the Revenue Courts against a tenant of old waste holding under a year's lease given before the Act merely on the ground that the lease has expired and the plaintiff has not consented to his holding over.

Per Tyabji, J.:—Such an antion will lie only in the Civil Court.

Sankara Venkataratnam v. *Sri Rajah Varadarajah Appa Rao* (*Oldfield and Tyabji, JJ*). 184

Madras Act—*Contd.* PAGE.

———**Ss. 27, 28**—*Rebuttable presumption—Payment of varying rates in money—Original waram—No permanent substitution of money system—Reversion to waram—Propriety of.*

Where for a number of years, the tenants were paying in money but there was no binding permanent arrangement substituting payment in money for the original waram system.

Held, that if the landlord did not agree to the preceding year's rates, the court was bound to declare waram as the proper mode of payment:

Held, also that Ss. 27 and 28 of the Estates Land Act only raise a presumption that the same rent is payable as was paid in the preceding year but this presumption may be rebutted.

An *ex parte* decision in a suit for rent fixing the rent for the year which expressly left open the question whether the landlord was not entitled to claim waram, would not preclude the raising of that question in subsequent years.

Held, that Gudipakattu was only a provisional arrangement and did not preclude reversion to waram.

Ayyaperumal Odaiyan v. *Ramasami Chettiar* (*Spencer and Coutts-Trotter, JJ.*) 362

———**S. 151 (1)**—*Materially impairing in value and rendering unfit for agricultural purposes—The holding as a whole to be so affected to give a right of action.*

The question under S. 151 of the Estates Land Act is whether the holding *as a whole* has been materially impaired in value for agricultural purposes and rendered substantially unfit for such purposes. The fact that a portion alone has been so impaired in value and rendered unfit for cultivation without substantially impairing in value and rendering unfit for agricultural purposes the whole, is insufficient to give the landlord a right of action under the section.

Hari Mohun Misser v. *Narayana Singh*, (1907) I. L. R. 34 C. 718= 17 M. L. J. 361 applied.

Ramachetty v. *Arunachalam Chetty*. (*Sadasiva Aiyar and Napier, JJ.*) 724

———**S. 151, 152**—*Compensation in lieu of ejectment—No severance of relationship of landlord and tenant.*

Payment of compensation under S. 152 of the Estates Land Act, in lieu of ejectment does not sever the relationship of landlord and tenant between the parties, the compensation being only for the injury done to the landlord by the wrongful conversion and not for the severance of the relationship.

Sankaralinga Moopanar v. *Subramania Pillai*. (*Seshagiri Aiyar and Napier, JJ.*) 514

———**Ss. 210 and 211**—*Limitation Act of 1887, S. 7—Suit for arrears of rent for faslis which expired more than three years prior to the coming into force of the Act—Limitation—Minority, if a ground for exemption—Statutes of limitation—Retrospective operation, when—General Clauses Act, S. 6, cl. (e)—Madras Act I of 1891, S. 8, cl. (e).*

Where after the coming into force of the Madras Estates Land Act a Zemindar brought a suit for arrears of rent for faslies which expired more than three years before the Act but within three years of his attaining majority: *Held* (per *Wallis, C J. and Kumaraswami Sastri, J., Seshagiri*

Madras Act—*Contd.* PAGE.
Iyer, J. contra) that S 211 of the Madras Estates Land Act had no retrospective operation so as to extinguish causes of action that were alive at the passing of the Act and that the suit was not barred by limitation.

Per Wallis, C.J.—The principle, which has received legislative recognition in S. 8, cl. (*e*) of the Madras General Clauses Act, is that where an Act contains provisions for the limitation of suits which take away altogether a vested right of suit without providing any equivalent remedy, then, the provisions must be considered to have been enacted subject to the implied exception that they are not to extend to such vested rights of suit which are to continue subject to the rules of limitation in force at the passing of the Act.

Per Kumaraswami Sastri, J.—Though laws affecting limitation might abridge or enlarge periods of limitation in cases of suits or causes of action which are alive at the date when the new enactment comes into force and which under the old law would expire afterwards, the change cannot, unless there is a clearly expressed intention to the contrary either by apt words in the enactment or otherwise, operate retrospectively so as to destroy rights of suits which are alive on the date.

Reid v. *Reid* (1886) L. R. 31 Ch. D. 402. *Colonial Sugar Refining Co.* v. *Irving* (1905) A. C. 369. *Gopeswar Pal* v. *Jiban Chandra* (1914) I. L. R 41 C 1125 referred to. *Ramakrishna Chetty* v. *Subbaraya Aiyar* (1912 24 M. L. J. 54 approved.

Rajah of Pittapur v. *Gani Venkata Subba Rao.* (*Wallis, C. J., Seshagiri Aiyar and Kumaraswami Sastri, JJ.*) (*F. B.*) 1

——**Ss. 213, 189, 134**—*Ryotwari Land owner—Distraint excessive—Suit for damages—Jurisdiction—Revenue Court.*

A suit by the tenant of a Ryotwari land-owner or of any sub-tenant of such for damages for illegal distraint of movable property, growing crops, of the produce of land or trees in the defaulter's holding is slowly cognizable by the Revenue Court.

Narayanaswamy Aiyar v. *Venkataramana, Aiyar.* (*Wallis, C. J., Sadasiva Iyer and Srinivasa Iyengar, JJ*) (*F. B.*) 607

Madras General Clauses Act I of 1891 S. 8 cl. (e)—Principle of—Act affecting vested rights—Interpretation—Retrospective operation when permissible. *See* Madras Estates Land Act—Ss. 210, 211 1

Madras Land Encroachment Act (Act III of 1905), S. 2—*Madras Irrigation Cess Act* (*VII of 1865*)—*Amendment to—Construction of—Preamble—Not to limit—Declaratory Act—Applicability to pending suits—Crown grant—Construction in favour of Crown—Sanads—Effect of—Ownership in flowing water—Streams bounding the Zemindari if conveyed—English rules of construction—Riparian rights and ownership distinguished—Ownership of bed not ownership of water—Specification of wet area in Sanads, &c.—Object of—Evidence Act S. 93—Government publications—Value of, in construing grant*

Per Oldfield, J.—Madras Act III of 1905 being as regards the ownership of Government in flowing waters a declaratory Act, has a retrospective operation and ought to be applied even in suits which were pending at the date when it was passed.

The right of a riparian owner in the water of the adjoining stream is only a right of user and is in no sense a right of ownership. He has no

Madras Act—*Contd.* PAGE

right to allow it to be used by a non-riparian proprietor or for the purposes of a non-riparian tenement.

The presumption of Government ownership as laid down in S. 2 of Act III of 1905 is not rebutted by showing that the bed of the stream belongs to another wholly or in part.

The rule that Crown grants are to be construed beneficially to the Crown applies to permanent Sanads issued to Zemindars, Inamdars, &c.

Neither the language of the Sanads nor the conduct of the Government and its officials justifies the view that the ownership in water of natural streams which adjoin the Zemindari is granted to the Zemindars.

The opinions and intentions of the Government and its officers as expressed in the various Government publications are not legitimate materials for the construction of the grant in favour of the Zemindars, regard being had to S 93 of the Indian Evidence Act.

The operation of Act VII of 1865 is not confined to rivers in ryotwari tracts or to cases of irrigation works constructed by the Government.

The fact that the channel which brings the water from the river was at the time of the settlement part of the irrigation system of an estate, does not make the water, water of the Zemindar.

Sadasiva Aiyar, J: S 2 of Act III of 1905 enacts only a rule of evidence and as such is applicable even to pending suits.

The presumption of ownership in flowing water raised by it is rebutted by showing that the bed of the stream over which the water flows does not belong to the Government. That section cannot be reasonably held to abrogate the ordinary juristic principles regarding flowing waters or to create a new kind of ownership in the Government in respect of them which entitles them to impose assessment for their use though they themselves have no ownership in them.

It is now too late to question the rights of Zemindars to half the bed of the streams which adjoin the Zemindari.

The amendment of 1900 to Act VII of 1865 cannot apply to water flowing over or percolating into Zemindari or Inam lands and no cess therefore can be levied under the Act for the use of such water excepting probably in the case of water made available for irrigation through works belonging to or contructed by Government.

Per Bakewell, J.—Act III of 1905 applies to such cases of limited property as arise from ownership of the river bed The owner of the river bed has a qualified ownership in the stream of water which flows over it by virtue of which the river or stream may be said to belong to him.

The decisions relating to the construction of English conveyances of land are inapplicable to the Sanads issued under Regulation XXV of 1802 and it cannot be presumed that half the river bed forming the boundary of the Zemindari passes to the Zemindar.

The Sanad cannot be construed as a grant of all the rights vested in the sovereign in respect of the Zemindari except such as were expressly reserved. It does not purport to create any rights of property or to make a grant of any particular estate in land but rather to invest a certain person with the position and status of Zemindar, to make that position permanent, transferable, and heritable and to fix the land-tax payable to the Government The rights of the Zemindar are such as were appurtenant to the Zemindari at the date of the Sanad and the burden is on

Madras Acts—*Contd.* PAGE.
him to show that his rights extended beyond the natural boundaries of the Zemindari. Where half the bed of a river belongs to the Government the water flowing from the river at any point is water which comes by direct or indirect flow from a river or stream belonging to Government from or through adjoining land and is therefore chargeable under Act VII of 1865.

The object of specifying in the original grant and at the Inam settlement the number of wet acres is to declare the extent of the grantee's rights of irrigation, that is, he is allowed to take only sufficient water to irrigate the number of acres therein dealt with as wet.

Per Oldfield and Bakewell, JJ—The operation of Act VII of 1865 is not limited by the preamble to the Act.

The judgment of Sankaran Nair, J., in *Secretary of State* v. *Janakiramayya* (1912) I. L. R 37 M. 322=24 M. L. J. 365 reversed ...

The Secretary of State for India v. *Janakiramayya* (*Oldfield, Sadasiva Aiyar and Bakewell, JJ.*) (F. B.) 89

Madras Forest Act (Act V of 1882), S. 6. 16—*Reserved Forest—Omission to give notice—Proceedings without jurisdiction—Not cured by subsequent knowledge and failure to object—Inam title-deed—Construction —Besides poramboke—Unassessed waste land included—Inam register —Area under estimated—effect of.*

Where the Forest Settlement Officer failed to give plaintiff owner of the adjoining land the notice prescribed by S 6 of the Madras Forest Act and the final notification under S. 16 was made declaring the land reserved land.

Held, that the proceedings of the Settlement Officer were without jurisdiction and could not affect plaintiff's right of action under the general law.

The irregularity was not cured by the plaintiff coming to know of the proceedings before the final proclamation and his failure to object.

Nusserwanjee Pestonjee v. *Meer Mynodeen Khan* (1856) 6 M. I. A. 134, 155, *Saunby* v. *London County Council* (1906) A. C. 110, *Harrow* v. *Rathmines* and *Rashgar Improvement Commission* (1892) A. C. 498, *Rameshwar Singh* v. *Secretary of State for India* I. L. R. 34 C. 370, followed.

The words "besides poramboke" in an inam title-deed are sufficient to confer rights in all unassessed land in the village and their effect is not to be cut down because the Inam Register which is before the survey under-estimates the area of the unassessed land when there is no good ground for holding that the whole area was not intended to be granted.

Balakrishna Rao v. *Secretary of State for India.* (*Wallis, C. J. and Coutts-Trotter, J.*) 276

Madras Irrigation Cess Act (VII of 1865)—Opration of—Preamble—Effect. *See* Madras Land Encroachment Act (F. B.) ... 389

Madras Rent Recovery Act—*Landlord and tenant—Kanganam and Kulavettu —Voluntary payments.*

Kanganam and Kulavettu are in the nature of voluntary payments and cannot be recovered.

Chidambaram Chetty v. *Ayyavu.* (*Seshagiri Aiyar and Kumaraswami Sastri, JJ.*) 746

Madras Acts—*Contd.* PAGE.

Madras Revenue Recovery Act (II of 1864) S. 8.—*Distress—Non-service of demand on absent pattadar—Resistance to distrainer, if an offence —'Pattadar,' meaning of.*

The Madras Revenue Recovery Act does not contain any provision requiring the demand in writing described in S. 8 to be delivered to the defaulter in person before distress, when the defaulter is absent on the day of distress. The act of the distrainer in those circumstances in distraining without serving the demand on the defaulter is therefore not illegal and resisting the distraint is an offence.

Semble: The "defaulter" referred to in S. 8 of the Act is the person rigistered as pattadar.

Queen-Empress v. *Ramasami* (1893) I. L. R. 16 M. 364 referred to

Marakkar In re (*Spencer and Coutts Trotter, JJ.*) ... 60

Mahomedan Law—*Labbais — Custom — Exclusion of females from succession—Proof of—Question of fact.*

Held, upon the evidence that if the *Labbai* family in question the custom of following the rule of Hindu Law excluding females from right of succession prevailed *Mira Bibi* v. *Vellayanna* (1885) I. L. R. 8 M. 464. not followed.

Under the provisions of the Civil Courts Act, it is a question of fact in each case as to what is the usage governing any family, *Kunhambi* v. *Kalanthar* (1914) 27 M. L. J. 156 followed.

Mode and extent of proof of custom discussed.

Shiek Ibrahim Rowther v. *Muhammad Ibrahim Rowther*. (*Wallis C. J. and Srinivasa Aiyangar, J.*) 763

———Gift— Essentials of— Minor donee—Transfer of possession—Necessity. *See* Transfer of Property Act—S. 43 ... 734

Malabar Compensation for Tenants Improvement Act, Ss. 9 to 19 (Madras Act I of 1900)—*Kanom before 1886—Contract disallowing compensation for clearing jungle and converting into Paramba—Provision for rates—Option to tenant to claim rates under the Act, if more favorable—Partial redemption is permissible when there has been a splitting up of the mortgage with the consent of both the parties.*

Where a kanom document executed before 1886, provided that the mortgagor need not pay the cost of clearing the jungle lands and converting them into parambas.

Held, following *Kochu Rabia* v. *Abdur Rahman* (1913) 26 M. L. J. 523, that the contract was not saved by S. 19 of the Malabar Tenants Improvement Act and the tenant was entitled to compensation.

Held, also, that the tenant was not prevented from claiming compensation according to the Act if the terms of the mortgage agreement were less favorable to him even though the mortgage agreement was executed before 1886.

Abdulla Rowthan v. *Raja Vasudeva Ravi Varma*. (*Sadasiva Aiyar and Napier, JJ.*) 316

Malabar Law—*Agreement of service—Contract to pay remuneration in the event of success in suit by junior members—Suit compromised—Right of action—Legality of—Right of junior members to protect estate and be reimbursed expenses—Lenders for the purpose to juniors—Right to proceed against the family estate.*

In a suit to recover from the defendant's Tarwad the remuneration which defendants 1 and 2 had when they were junior members promised,

Malabar Law—*Contd.* PAGE.

in the event of success, for plaintiff's services in connection with the contemplated suit against Government to protect the family estate but which he had failed to earn by reason of the first defendant's compromising the suit.

Held, that in the absence of proof that the suit was in the interests of the family and also agreement to pay the plaintiff the remuneration stipulated for was necessary, the action was unsustainable

Per Chief Justice:—If the Karnavan for the time being is submitting to an infringement of the Taward's right of property it is competent to the next senior members to institute a suit to protect the rights of the family.

Quaere, if an implied agreement to continue a suit to give the plaintiff his chance of earning the remuneration is not illegal.

Per Seshagiri Iyer, J: Though as a rule only the Karnavan can represent the Tarwad in transactions with strangers or pledge the family credit, when the karnavan is doing acts which seriously endanger the family property, the junior members have a right to take the steps necessary for the protection of the family interests and are entitled to reimburse themselves the expenses rightfully incurred in connection therewith and the persons that advance money for the purpose have similarly a right of recourse against the family estate though they run the risk of losing their money if it is found that the purpose of the loan was unnecessary or not beneficial to the family.

The case of ordinary co-owners distinguished.

Raja of Arakal v. *Churia Kunhi Kannan.* (*Wallis. C. J, and Seshagiri Aiyar, J*) 632

——— *Kanom—Suit for redemption—Burden of Proof—Title admitted—Evidence Act S. 90—Presumption applicable to copies—Practice—Civil Procedrue Code, S. 105 Cl. (2)—Remand set aside—Appeal from revised judgment—Findings given previously, open to question in appeal—Interest Act—Kanom in waiting—Time not speci fied—Interest not awardable.*

Where the title of the plaintiff is admitted and the defendants are shown to have come into possession as mortgagees, Courts will not demand such strict proof of the mortgage sued on as where title is denied and possession is not shown to have been under the plaintiffs.

The presumption as to ancient documents contained in S. 90 applies to copies as well as originals.

The custom of jenmis in Malabar of keeping marupats or copies of Kanom documents, referred to.

Where a Kanom document provided for the payment of so much per year without specifying the date on which the payment was to be made: *Held* that in the absence of a demand, no interest was claimable on the arrears.

Where in a suit for the recovery of possession on foot of a demise, the Lower Appellate Court differing from the Court of the 1st Instance found that the demise sued on was genuine and remanded the suit but the order of remand was set aside by the High Court on the ground that the disposal not being on a preliminary point, the remand was unauthorised.

Malabar Law—*Contd.* PAGE

Held, that on the appeal from the revised judgment of the Lower Appellate Court, it was competent to the defendant to question the finding as to the genuineness of the demise sued on.

Nanu Nair v. *Ashta Moorthi Nambudripad.* (*Spencer and Seshagiri, Aiyar, JJ*) 772

———*Putravakasom gift—Gift to wife and children—Incidents of tarwad property attached—Management of senior male—Maintenance of junior members—No right to partition—No alienation voluntary or involuntary.*

Properties given by a person to his wife and children or children alone following the Marumakkathayam law, are taken by the donees with the incidents of tarwad property, persons born into the tavazhi subsequently to the gift being entitled equally with the donees expressly mentioned. Individual members of the tavazhi are entitled to maintenance but are not entitled to claim partition or to alienate their shares nor can such shares be attached and sold in execution of decrees against them.

Per Srinivasa Aiyangar, J.—It is not the giving of the properties by a person to his wife and children that constitutes them tarwad, but if properties are given to a wife and children following the Marumakkathayam law they as tavazhi hold those properties with the incidents of tarwad property and the right of management of the properties is vested in the senior male member of the tavazhi.

Kunhacha Umma v. *Kutti Mammi Haji*, (1892) I. L. R. 16 M. 201, followed.

Chakkara Kannan v. *Kunhi Pokker.* (*Wallis, C. J, Sadasiva Aiyar and Srinivasa Aiyangar, JJ.*) (F. B) 481

Malicious Prosecution—*Intervention of some other person as prosecutor—Immaterial—Causing or procuring.*

If a person causes or procures another to be prosecuted he is liable notwithstanding the intervention of some other person as the direct or echnical prosecutor and it makes no difference whether the other person is or is not an officer of the law.

Where, however, it was found that though on a statement made by the defendant to the official superior of the plaintiff, plaintiff was prosecuted the defendant was unwilling to complain against the plaintiff that he made his statement more or less under compulsion, that the plaintiff was already suspected by his official superior and that the Government without any further inference on the part of the defendant beyond the statement made by him directed the prosecution of the plaintiff.

Held, that on these facts the defendant could not be held to be the person who set the law in motion against the plaintiff so as to be liable for malicious prosecution.

Manickam Mudaliar v. *Munusami Naidu* (*Ayling and Tyabji JJ.*)... 694

Maxim—"Generalia Specialibus non-derogant—Application of. *See* C. P. C.—Or 21 R. 31 (F.B.) 342

Mortgage (Simple) Adverse Possession—Possession adverse to mortgagor not adverse to mortgagee. *See* Limitation Act—Arts. 132,144 (F.B)... 645

———*Attestation—Transfer of Property Act, IV of 1882, S. 59—Pardanashin ladies—Not seeing the face of when signing—Suit by second mortgagee of one of the properties comprised in plaintiff's mortgage—*

Mortgage—*Contd.* PAGE.

Inadvertent passing of decree postponing plaintiff—Effect of—Plaintiff entitled to enforce his mortgage against other properties—Purchasers in execution of second mortgagee's decree under S. 90.

Where it was objected that a mortgage executed by two Pardanashin ladies was not duly attested because the attesting witnesses did not see the ladies' faces when they signed but it appeared that the witnesses saw them sign and recognised their voices though by reason of a *chik* between, they were unable to see their faces. *Held*, that the attestation was sufficient in law.

In a suit upon a second mortgage of one of the properties comprised in the plaintiffs' mortgage, a decree was inadvertently made that the plaintiffs should be paid the amounts due to them out of the balance remaining after satisfaction of the second mortgagee's claim. *Held*, that this did not preclude the plaintiffs from enforcing their mortgage against the other properties included in their mortgage though they had been in the meanwhile purchased by the defendants in execution of the decree in favour of the second mortgagees passed under S. 90 of the Transfer of Property Act.

Padarath Halwai v. *Pandit Ram Narain Upadhia* (*Sir John Edge*) (P. C.) 159

————(**Simple**)—Decree for sale—Receiver—Appointment—Jurisdiction—Personal remedy barred—Effect. *See* Receiver ... 457

————With possession—Decree for sale—Omission to provide for accounts of profits—Execution—Inquiry as to accounts of profits—Jurisdiction—Expression by Decree-holder of willingness to give credit for profits—Estoppel. *See* C. P. C. of 1908—O. 21 R. 2 219

————Prior and subsequent mortgages—Second mortgage of one of the properties comprised in first mortgage—Suit by second mortgagee—Inadvertent postponement of first mortgagee—Effect on his right to enforce mortgage against other properties. *See* Mortgage—Attestation (P.C.) 159

————Mortgagee holding two mortgages—Suit on later mortgage reserving rights under earlier one—Maintainability. *See* Transfer of Property Act—Ss. 61, 99 (F. B.) 195

————*Redemption—Mortgage for a term—Provision for payment of mortgage money within a specified period—Redemption before expiry of the term allowable.*

Where a usufructuary mortgage deed provided for the repayment of a portion of the mortgage debt at the end of March 1910 and for the repayment of the balance, "within the end of March 1952".

Held that the mortgage was redeemable at any time before the end of March 1952.

A provision for payment by the mortgagor on or before a certain date is sufficient indication of an intention to allow him to redeem before that date.

Rose Ammal v. *Rajaratnam Ammal* (1898) I. L. R. 23 M. 33 *Chinnaswami* v. *Krishna Reddi* (1906) 16 M. L. J. 146 followed.

Baktawar Begum v. *Husaini Kanum* (1914) I. L. R. 36 A. 195=26 M. L. J. 474 and *Bir Mohamed Rowther* v. *Nagoor Ravuther* (1914) 27 M. L. J. 488 distinguished.

Chandu alias Shinivasa Pai v. *Koaja Povjari*, (*Wallis, C.J and Seshagiri Aiyar, J*) 86

Mortgage—*Contd.* PAGE

——— Redemption—Cloga—Doctrine of—Applicability to anomalous mortgages. *See* T. of P. Act. S. 98 525

——— Redemption Suit—Decree—Order extending time for payment—Appeal. *See* C. P. C.—Or. 34 R. 8 708

——— *Joint Mortgagors—Separate properties of two persons—Security for joint debt—Payment by one of a portion of the debt and release of his property—Right of mortgagee to proceed against the property of the co-mortgagor—T. P. Act, Ss.* 67 *and* 82.

As between the original parties the release by a mortgagee of the property of one of the mortgagors from the mortgage security does not affect his lien upon the residue for the whole debt and it is not open to the other to claim a proportionate reduction on the ground of such release.

Per Spencer, J.—The person so released is not a necessary party to the action as against the other properties.

Napier, J.—Courts should be very slow in introducing equities based on equitable doctrines applied to English mortgages into the statutary mortgage law of this country.

Mir Eusuff Ali Haji v. *Panchanam Chatterjee* (1910) 11 C. L. J. 639, 647. followed.

Krishna Iyer v. *Muthukumarasami* (1905) I. L. R. 29 M. 217 distinguished.

Venkata Subba Reddi v. Bagiammal (*Spencer and Napier, JJ.*) 319

——— Suit for sale—Preliminary decree—Costs—Declaration of personal liability of purchaser of mortgaged property subsequent to mortgage—Validity. *See* C. P. C. 1908—Or. 34 Rr. 4 (1), 5 and 6 120

——— Suit for Sale—Decree—Form of, under Transfer of Property Act: *See* C. P. C. of 1908—Ss. 47, 73. 96

——— Debt—Transfer—Covenant for title if implied—Breach of—Damages—Suit to recover—Limitation—Cause of action. *See* Tr. of P. Act.—S. 55 (2) 454

Mulgeni—*Prohibition against alienation—No right of recovery reserved—Agreement to surrender if land not required—No complusion to surrender—Act V of* 1884—*Lease silent as to payment of cases by tenant—Landlord's right to recover half the cess from the tenant.*

Alienation of land by a Mulgeni tenant, who had agreed to enjoy the land without alienating it and to relinquish it if not required by him, does not indicate a desire to relinquish the land. Such a clause does not work a forfeiture.

Parameshri v. *Vittappa Shanbogha* (1902) I. L. R. 26 M. 157 referred to.

Act V of 1884 does not restrict the landlord's right to half the case from the tenant to cases where the lease deed contains a provision to that effect.

Mailthi Hengsu v. *Soma.* (*Oldfield and Tyabji, JJ.*)... ... 452

Negotiable Instruments Act (XXVI of 1881), S. 118 (a)—*Negotiable Instrument—Consideration for—Presumption—Executant, a young man of extravagant habits and out of possession—Effect—Evidence Act, S.* 114, *ill* (c) *and explanation to illustration* (c).

Where, in a suit upon three promissory notes executed by the 1st defendant, (who died pending the suit leaving his widow, a young woman as his representative), it appeared that the notes were executed within a

Negotiable—*Contd.* PAGE

short time of each other, that the defendant was only 21 years of age when he executed the notes, that he was a man of considerable property but at the time out of possession, the properties being in the management of his elder brother and that he was a man of extravagant habits and it also appeared that the plaintiff had not the means to make the alleged advances.

Held, that these circumstances were sufficient to shift the onus on to the plaintiff to make out that full consideration was paid as alleged by him. *Moti Gulab Chand* v. *Mahomed Taria Topan* (1894) I. L. R. 20 B. 367 followed.

Sundarammal alias, Sowbhagiammal v. *Subramania Chettiar. Wallis, C. J and Seshagiri Aiyar, J.)* 236

———**Partnership**—*Suit for Accounts—Dissolution—Interest—Preliminary decree—Part ordering inquiry if to be separated and treated as order—If may be questioned on appeal from final decree—Order—Civil Procedure Code (Act V of 1908)—Ss. 97 and 2 (2)—Defective. Partner trading with partnership fund on his own account—Liability to account with interest.*

In a suit for accounts of a dissolved partnership, various matters including the membership of the firm were in dispute The trial Judge holding that the partnership was dissolved from a certain date prior to suit referred it to the referee to ascertain as to who were the partners entitled to a share in the assets and good-will of the partnership in question and to take an account of the dealings of the parties with the assets of the partnership. This formal adjudication was not appealed against. In the appeal from the final decree, it was for the first time contended that the trial Judge ought to have tried the matter himself and not referred it to the referee, that the reference was an order and not a decree, and as such S. 97 was not a bar to the matter being urged in appeal.

Held; that the first order of the trial Judge was a "decree" and ought to have been appealed against, and could not be questioned in appeal from the final decree.

The Code makes no provision for something which is neither a decree nor an order, nor for anything which is both; neither does it provide that one adjudication by the court can be resolved into diverse elements some of which are decrees, some orders. What is in substance a decree does not cease to be such because a subordinate part of it, if correctly made, might have been made separately as an order.

Held, further, that it was settled law that when after dissolution but before settlement of partnership accounts, one partner carries on business with partnership assets the other partners have a right to claim the assets with profits or with interest, and this apart from fraud or misconduct in the nature of fraud.

Khadir Hossein v *Emdal Hossein* (1901) I. L. R. 29 C. 758 referred.

Ahmed Musa Saleji v. *Hashim Ebrahim Saleji (Lord Sumner) (P. C.)* ... 70

———**Penal Code, S. 228**—*Essentials of offence under—Duty of Courts taking action under S. 228.*

To constitute an offence under S. 228 of the Indian Penal Code, the Court has to be satisfied that the accused intentionally offered interruption to the Court.

An audible remark which had the effect of interrupting the Court is not enough to convict accused.

Negotiable—*Contd.* PAGE.

In cases coming under the section, the Court is both prosecutor and judge and so the powers should be used only in exceptional cases. Courts taking action under S. 228 ought not to give room for the impression that they are unduly sensitive.

Ramasami Goundan In re. (*Seshagiri Aiyar, J*) 274

Plaint—Amendment—Suit barred on date of—Effect. *See* Limitation Act—Art. 120 464

Pleadings—*Dismissal of a suit on, not warranted except in very clear cases.*

The practice of dismissing a suit on the pleadings alone, is highly to be deprecated, and ought not to resorted to except in absolutely clear cases.

Venkatarama Aiyar v. *Rajagopala Iyer.* (*Spencer and Coutts-Trotter, JJ*) 786

Practice—High Court—Conflict of authority—Procedure—Reference to Full Bench—Introduction of opinion of Judge not party to judgment —Desirability *See* Hindu Law—Mitakshara School (P. C.) ... 434

———*Pleadings, amendment of—Inconsistent or alternative claim, after all the evidence is closed—Power of Courts to allow—Civil. Procedure Code, S. 115—High Courts Act, S. 15—Revision—Interference, where another remedy exists.*

Where in a suit brought for enforcing the terms of a contract on the basis that it was a valid and subsisting contract, after the case was closed and the arguments almost over the Court directed the defendants to file an additional written statement to meet a case based on the impossibility of performance of the contract, raised in the course of the plaintiff's pleader's arguments in reply.

Held: that the procedure adopted was wholly irregular.

The proper course for the Court to adopt was to direct the plaintiff to apply for leave to amend his plaint, then to see whether there were grounds for such amendment, and on such amendment being made to call for a further written statement, to raise an issue on the same and proceed to try it.

The High Court can interfere in revision with interlocutory orders of Subordinate Courts, where patent irregularities in procedure are brought its notice.

The power of superintendence of the High Court under S. 15 of the Charter Act and the powers given by S. 115 Civil Procedure Code, are intended to give the High Court jurisdiction to see that the proceedings before the Lower Courts are properly conducted and the High Court should not refuse to set right matters, if by doing so, it would save unnecessary expense or delay or multiplicity of proceedings.

Sri Poosapathi Ramachandra Raju v. *Sri Rajah Vachavayi Venkata Subbayamma.* (*Kumaraswami Sastri, J.*) 58

———Appeal. Interference with discretion of court below. *See* Letters Patent (Madras) Cl. 15. 12

———Appeal—Interference in—Receiver—Appointment—Discretion of court below. *See* Receiver 209

———*Appellate Side Rules of Practice. Rule 105—Dismissal for not prininig, not* ultra vires.

Practice—*Contd.* PAGE.

Rule 105 of the Appellate Side Rules of Practice providing that an appeal shall be liable to be dismissed if papers are not printed is not *ultra vires* of the High Court.

Parkum Cheepothi Ammad v. *Ambalathan Kandi Ayissa.* (*Ayling and Tyabji, JJ.*) 784

———Evidence—Non-production of documents by one party—No application by opposite party for affidavit of documents or for their inspection or production—Adverse inference as to contents of such documents—Legitimacy. *See* Benami Purchaser (P. C.) ... 335

———High Court—Subordinate courts—Duty of latter to follow decisions of former. *See* Hindu Law—Adoption 63

———Pleadings,—Fraud, etc—Particulars of—Necessity. *See* H. Law —Adoption. 63

Principal and agent—*Contract—Agreement to pay something for collection of old debts without specifying amount—Whether enforceable—Test—Nattukottai Chetti—Practice—Duty of agent.*

Where a Nattukottai Chetti principal promised to give his Burma agent some thing as remuneration in respect of sums collected from his old debtors without specifying the amount and it was contended that such a contract was not enforceable.

Held, in law that it is a question depending upon the circumstances of each case whether an alleged agreement of this sort constituted an unqualified contract to give something or whether the party agreeing had the option of giving anything or nothing at all; in the one case there being an enforceable contract and in the other, no cause of action at all if he chose not to give anything.

Held, in the circumstances of the case there was such a contract.

According to the custom of Nattukottai Chetties, the duty of the agent sent to transact money-lending business does not extend to collecting old debts which he is not willing to take over from his predecessor and he is entitled to special remuneration for the collection of such debts.

Vellayam Chetty v. *Kulandavelappa Chetty.* (*Coutts Trotter and Srinivasa Ayyangar, JJ.*) 749

——— Agent acting in excess of authority—Acquiescence or silence of principal—Ratification—Agent deriving advantage from his position—Purchase of immovable property outside British India—Remedy of principal—Suit in British Indian Court against agent—Jurisdiction—Decree—Form of. *See* C. P. C. S. 11—*Res judicata* ... 551

———Termination of authority—Insolvency of principal—Date of presentation of petition or date of order of adjudication. *See* Provincial Insolvency Act—S. 4. 788

———Government and its agents or servants—Acts of agents or servants done in pursuance of Statutory powers—Tortious Acts—Liability of Government for. *See* Assam Labour and Emigration Act, 1901 ... 280

Privy Council—Appeal—Leave to—Order in disciplinary proceedings under Cl. 10 of Letters Patent. *See* Letters Patent (Madras) Cls. 10 and 39. 16

Promissory Note—Suit on—Consideration—Proof—Onus—Executant, a young man of extravagant habits and out of possession. *See* Negotiable Instruments Act S. 118 (a). 236

Provincial Insolvency Act (III of 1907) S. 4—*Act of Insolvency by agent—Service of notice on agent,—Sufficiency of—Rule 21 cl. (3) under S. 51—S. 16, Scope of—Relation back—Confined to dealings with property—No termination of agency.*

The appellant was the sole partner of a firm carrying on money-lending business at Calicut with the head office at Bombay. The local agent gave notice that the firm had stopped payment at Bombay on which one of the creditors applied in Calicut that the appellant might be declared an insolvent. The appellant was declared an insolvent after serving notice on the local agent who appeared and objected to his principal being so declared.

Held, that having regard to S. 4 Explanation, of the Provincial Insolvency Act the appellant could be declared an insolvent on the act of insolvency committed by the agent and that service on the agent was sufficient service.

The rule enacted in S. 16 of the Provincial Insolvency Act that the order of adjudication relates back to the date of the presentation of the petition affects only dealings with property and has not the effect of terminating the agency as on that date

Kalianji Singji Bhai v. *The Bank of Madras.* (*Spencer and Phillips, JJ*) 788

———**S. 16**—Scope of—Principal and agent—Termination of authority—Insolvency of principal—Date of petition or date of order of adjudication. *See* Provincial Insolvency Act—S. 4 788

———**S. 22**—*Official eceiver—Sale by—Jurisdiction to set aside—"Aggrieved"—Unsecured creditor an aggrieved person.*

S. 22 of the Provincal Insolvency Act gives unfettered discretion to the Court to set aside orders passed by the Official Receiver. The Court has, therefore, power to set aside an improper sale by the Receiver.

An unsecured creditor of the insolvent is a person "aggrieved" by such sale and can apply to the Court to have it set aside.

Tiruvenkata Chariar v. *Thangayi Ammal.* (*Spencer and Seshagiri Aiyar, JJ.*) 755

———**Ss. 46, 6, sub-sec. 4 (c)**—*Appeal—Parties—Presentation of a creditor's petition in the District Court after the prescribed time—Presentation within time Rin Court not having jurisdiction—Valitity of—Limitation Act, S. 14.*

In an appeal under S. 46 of the Provincial Insolvency Act, only parties directly affected by the appeal are entitled to notice.

In re A Debtor (1901, 2 K. B. 354) followed.

Held, accordingly, in an appeal against an order of adjudication by one of the creditors, that notice to creditors other than those on record was, in the absence of special circumstances unnecessary.

S. 14 of the Limitation Act, does not apply to cases under the Provincial Insolvency Act.

Where a cretitor presented an insolvency petition within 3 months of the act of insolvency in the Sub-Court which had no jurisdiction to entertain the petition, and on the petition being returned for presentation to the proper Court presented it in the District Court, when more than 3 months had expired from the act of insolvency, *Held* that the petition was out of time.

Deva Rao v. *Pandit Parameshraya.* (*Oldfield and Tyabji, JJ.*) ... 451

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Presidency Small Cause Courts Act, S. 41—Ejectment Suit—Notice to quit—Validity—Erroneous decisions as to High Court—Revision—Interference in Jurisdiction. *See* C. P. C. S. 115 (a) and (c) ... 353

Punjab—Land Tenure—*Custom—Proprietors of houses—Paying. Tirni—Not owning land assessed to land revenue—Claims to share in village common land.*

Where the plaintiffs who owned house sites and were paying tirni or grazing dues but did not own any land assessed to land revenue claimed that they were entitled to share in the common lands of the village like proprietors owning lands assessed to land revenue.

Held, that they were not so entitled.

Bagga v. *Saleh.* (*Sir John Edge*) (*P. C.*) 137

Receiver—*Application for appointment of, pending suit—Defendants in possession under order of Magistrate and with a* prima facie *superior claim—Effect—Trust property—Poverty of trustee—Management by rotation, not a ground for appointing receiver—Long leases—Discretion—Property* in media *after the death of the owner—Appointment of receiver.*

Where the plaintiffs sued for recovery of certain properties from the defendants who were in possession of the same claiming to be the heirs of the last owner, but it appeared that the defendants had a better *prima facie* title and had also been recently maintained in their possession of the properties by an order of the Magistrate,

Held, that there was no ground for the appointment of a receiver.

The mere fact that the defendants are poor or that they manage the property by rotation is no ground for removing them from the management of endowment properties in their possession and appointing a receiver.

It may be an error of judgment on the part of a trustee to grant long leases but it is no ground for removing him from management.

If the facts are undisputed and the lower Court comes to the conclusion that a receiver should or should not be appointed, ordinarily the appellate Court would not interfere with the lower Court's exercise of discretion, but it is otherwise where it is found that the lower Court has come to a wrong conclusion on the facts.

Where property is *in media* after the death of the last owner and a dispute exists as to who is entitled to the property, the proper procedure is to appoint a receiver.

Sivaji Rajah Sahib v. *Aiswariyanandaji Sahib*, (*Seshagiri Aiyar and Kumaraswami Sastri, JJ*). 209

Receiver—*Appointment of—Decree for sale on simple mortgage—Personal remedy barred—Mortgage—Power of Court to appoint receiver.*

Per *Oldfield, J.* (*Sadasiva Aiyar, J.* contra).—The Court has power to appoint a receiver of the mortgaged property where a decree for sale is passed on a simple mortgage, though the personal remedy is barred by limitation.

Per Curiam.—The fact that the mortgage being a simple mortgage, would not entitle the mortgagee to the possession of the property or its profits, is not in law a bar to the appointment of a receiver.

Vankata Raja-Gopala Surya Row Bahadur v. *Basivi Reddi.* (*Oldfield and Sadasiva Aiyar, JJ.*)... 457

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Registration Act—S. 17—Cl (2) Sub—cl (vi)—Registration—Necessity—Compromise incorporated in decree but not in operative part. *See* H. Law—Widow—Compromise 779

Regulation XXV of 1802—Sanads issued under—Construction—Principles—Decisions relating to construction of English conveyances of land—Applicability. *See* Madras Land Encroachment Act (F. B) ... 389

Religious Endowment—*Math—Mahant—Succession—Election by dasnam-bhik—Burden of proof—Defendant in possession*

When the founder has not prescribed any rules or practice to be followed in the selection and appointment of future mahants, the selection and appointment of a person to be a mahant on a vacancy occurring in the mahantship must depend on the custom or usage and the practice which have prevailed in the appointment of mahants in the past.

Where two persons one as *sadhak* or disciple and the other as guru-bhai or co-disciple of the deceased mahant claimed to have been elected by *dasnam-bhik* or ten-classes of mendicants as mahant of a temple in Hardwar.

Held, that the defendant being in possession of the temple and the property appertaining to it, it was for the plaintiff to prove his right to the mahantship.

An election by the *dasnam-bhik* to be a valid and effectual election must be by a majority of the *dasnam-bhik* assembled for that purpose and not a separate election by a faction of the *dasnam-bhik*.

Mahant Lahar Puri v. *Mahant Puran Nath*. (Sir John Edge) (P. C.) 75

Rel. Endowments Act S. 10 *Appointment of Committee member—Rule 94, Civil Rules of Practice—No application to proceedings under S. 10—C. P. C S 115.—No revision under.*

Rule 94 of the Civil Rules of Practice as to taking evidence has no application to proceedings under S. 10 of the Religious Endowments Act taken by the District Court for the appointment of a committee member.

Per Sadasiva Aiyar, J.—No revision under S. 115 C. P. C. lies against the order of the District Judge making an appointment under that section.

Nature of the proceedings under the section and remedies for abuse of power considered.

Subbier v. *Abboy Naidu*. (*Sadasiva Aiyar* and *Napier, JJ.*) ... 671

———— Office—Alienation—Validity—Custom of alienability—Effect. *See* Judgment. 558

Revision—Interference in—High Court—Jurisdiction — Interlocutory orders. *See* Practice—Pleadings.

Right of suit—*Execution sale—Set aside for irregularity—Decree-holder responsible—Suit for refund of poundage and for interest—Civil Procedure Code—O. 21, R. 92—No bar to.*

Where an execution sale is set aside on the ground of material irregularity for which the decree-holder is responsible, the purchaser has a remedy by way of suit to recover from the decree-holder the amount deducted from the purchase money for poundage as well as interest on the purchase and this right is not taken away by O. 21, R. 93.

Right to recover purchase money when sale set aside for want of saleable interest and for irregularity distinguished.

Parvathi Ammal v. *Govindaswami Pillay* (*Spencer and Seshagiri Aiyar, JJ*) 467

Right of suit—*Contd.* PAGE.

———Stranger to contract—Rule—Exception—Trust—Creation of—what amounts to. *See* Contract Act—S. 2 (*d*) 538

———*Vizagapatam Agency Rules—Attachment—Claim petition allowed—Suit for declaration of judgment-debtor's title to property—Maintainability of.*

Under the law prevailing in the Vizagapatam Agency, an action will not lie for a declaraton that an attached property in respect of which a claim has been allowed belongs to the judgment-debtor.

Maharaja of Jeypore v. *Hari Krishna Patro.* (*Sadasiva Aiyar and Spencer, JJ.*) 780

Riparian owner—Right in water of adjoining Stream—Nature and extent of. *See* Madras Land Encroachment Act, (F. B.) 389

Specific Performance—Agreement to sell—Unregistered sale—Deed—Admissibility in evidence. *See* Tr. of P. Act—S. 54 ... 721

Specific Relief Act, S. 9—*Joint possession—Not within.*

Joint possession cannot be decreed under S 9 of the Specific Relief Act.

Hari Narain v. *Elemjan Bibi*, (1912) 19 C. L. J. 117, followed. *Sabapathi Chetty* v. *Subaraya Chetty* (1881) I. L. R. 3 M. 250 referred.

Kothan v. *Kulla Vandu* (*Oldfield and Tyabji, JJ.*) 760

———**S. 11**—Suit for Specific movable property—Allegation and proof—Onus on plaintiff. *See* C. P. C—Or. 21, R. 31 (F. B.) ... 342

——— S. 26 (*e*) — Applicability — Contract. Variation subsequent to breach—Specific Performance—Suit for—Decree—Form of. *See* Contract Act—Ss. 62, 63... 126

Statute—Interpretation—Principle. Retrospective operation. Permissibility—Vested rights. *See* Madras Estates Land Act—Ss. 210,211 ... ...

———Interpretation. Declaratory Act—Retrospective operation. *See* Madras Land Encroachment Act (F. B.) 389

Succession Act S. 187—*Suit for issue of probate but no grant of probate owing to non-payment of stamp—Legatee cannot establish title—Court Fees Act* 1870 *S.* 4.

Where on the application of the defendant for probate there was a fiat of the Judge for the issue of probate but the probate was not actually issued through the failure of the defendant to pay the requisite stamp duty, though the defendant entered upon the administration of the estate.

Held, nevertheless, that there having been no grant of the probate within the meaning of S. 187 of the Succession Act, the plaintiff legatee under the will could not maintain an action for administration as against the defendant.

Alamelammal v. *Suryaprakasaroya Mudaliar.* (*Bakewell, J.*) ... 680

Suit—Dismissal on pleadings when justifiable. *See* Pleadings ... 789

Suits Valuation Act—*Mortgage—Suit for redemption—Jurisdiction—Valuation—Appeal—Forum—Court insisting upon payment of Court fee on total amount payable on redemption—Payment by plaintiff of same—Effect.*

In a suit for redemption of a mortgage, the principal amount of the mortgage must be taken as determining the jurisdiction under the Civil Courts Act (Madras).

Suits Valuation Act—*Contd.* PAGE

The authority of *Zamorin of Calicut* v. *Narayana* (1882) I. L. R. 5 M. 281 (F. B.) in this respect is unaffected by the enactments of the Suits Valuation Act.

Where in a suit instituted in the Subordinate Judge's Court for the redemption of a mortgage for Rs. 3,899-4-0, the Subordinate Judge erroneously insisted on the payment of a Court-fee on Rs. 7,218-6-11 the otal amount payable on redemption and the plaintiff paid the deficiency, *Held* that did not deprive the District Court of jurisdiction to hear the appeal.

Vasudeva v. *Mahadeva* (1892) I. L. R. 16 M. 326 followed, *Ijjatulla Bhuyan* v. *Chandra Mohan Banerjee* (1907) I L. R. 34 C. 954 (F. B.) distinguished ...

The appeal was accordingly returned for presentation to the proper Court.

Mahomed Jallaldeen Marakayar v. *Vijayaswami.* (*Wallis C. J. and Hannay, J*) 142

———*S. 4—Suit by unsuccessful claimant—Jurisdiction—Value of property, the test.*

Where an unsuccessful claimant brings a suit for a declaration that the property belongs to himself and not to the judgment-debtor making the judgment-debtor a party to the suit the *forum* is determined by the value of the property and not merely by the amount of the decree debt for which the property is attached.

Krishnasami v. *Somasundaraji* (1907) I. L. R. 30 M. 335=17 M. L. J. 95. doubted.

Narayan Sing v. *Aiyasami Reddi.* (*Seshagiri Aiyar and Napier, JJ.*) 728

Transfer of Property Act—S. 6 (a) Applicability—Hindu Law, Partition—Agreement that property of one of brothers dying without male issue should go by survivorship to others—Validity. *See* Hindu Law—Joint Family—Partition 214

———**S 43**—*Mortgage by son of property belonging to his father—Erroneous representation of present title to property—Mortgage suceeding to the property as heir Right of mortgage—Mahomedan Law—Gift—Essentials of—Minor donee—Transfer of possession, if necessary.*

Where a person mortgaged property belonging to his father erroneously representing that he was entitled to property *in presenti* and on his father's death he became entitled to the property as heir *held*, that S. 43 of the Transier of Property Act applied to the case and that the mortgagee could enforce his mortgage against the property mortgaged.

Where a Mahomedan made a gift of a field to his minor grandson during the life time of his son and at a time when all the three lived together in the same house the circumstance that possession of the field was not delivered to the minor's father is not fatal to the validity of the gift. In such a case the gift would be valid, if after it was made, the income or other benefit derived from the field was applied to the use of the minor so as to show that a transfer of ownership had been made.

Fakir Nynar Muhamed Rowther v. *Kandaswami Kulatha Vadan* (1909) I. L. R. 35 M. 120, ref.

The requisites of a valid gift under the Mahomedan Law, explained.

Alamanayakunigari Nabi Sab v. *Murukuti Papiah.* (*Ayling and Tyabji, JJ.*) 734

T. P. Act—*Contd.* PAGE.

——S. 51—Improvements—Right to—H. Law—Widow—Alienation—Absence of good faith—Right of alienee. *See* H. Law—Widow ... 357

——S. 54—*Property below 100 Rupees in value—Unregistered sale-deed—Title passes—With delivery of possession—Admissibility of, to prove agreement to sell.*

The existence of an unregistered sale-deed does not prevent title passing where property sold is less than 100 Rupees in value and there has been delivery of possession. The unregistered sale-deed may be used for proving the prior agreement to sell.

Kathari Narasimha Ragu v. *Bhupati Ragu.* (*Sadasiva Aiyar and Napier, JJ.*) 721

——S. 55 (2)—*Mortgage-debt transfer of—Covenant for title, if implied—Breach—Damages—Cause of action—Limitation Act. Art.* 116.

In the case of a transfer of a mortgage-debt there is no implied covenant for title so as to entitle the transferee to damages from the transferor, in case the security fails for want of title in the mortgagor.

The cause of action for a suit for damages for breach of a covenant for title in the case of a conveyance, arises on the execution of the conveyance.

Samu Pathan v. *Chidambara Odayan.* (*Srinivasa Aiyangar, J.*) ... 454

——S. 59—Mortgage-Attestation—Validity—Pardanashin—Mortgage by—Attestor not seeing face of executant when signing—Effect. *See* Mortgage—Attestation (P. C.) 159

——Ss 61, 99—*Civil Procedure Code, Order 34, R.—Mortgage—Mortgagee—holding two mortgages—Suit on second mortgage reserving rights under the first—Maintainability.*

A person holding two mortgages on a property sue for sale on the second mortgage reserving his rights under the first. ... ...

Subramania Aiyar v. *Balasubramania Aiyar,* (*Wallis C. J., Ayling and Sadasiva Aiyar, JJ.*) (F. B.) 195

——S. 98—*Anomalous mortgage—Possessory mortgage with a condition that property should become the mortgagee's on default as on a sale—Terms enforceable—Clog on the equity of redemption.*

A document, described as "Swadina Tanaka Meddatu Sharatu Pattiram" (possessory mortgage containing a condition for a period fixed) recited that the mortgagors had received Rs. 10 and mortgagee their house, site, etc., that they undertook to pay the principal and interest within a year and take back possession of their house, site, etc., and that if they failed to act according to the said conditions they would surrender the house and land treating the transaction as a sale. The document was dated 20-3-1894. In a suit for redemption brought in 1912.

Held, that the mortgage was an anomalous mortgage within the meaning of S. 98 of the Transfer of Property Act and the plaintiff had no right to redeem after the prescribed period.

S. 98 of the Transfer of Property Act is not controlled by S. 60.

Hakeem Patte Muhamad v. *Shaik Davood.* (*Spencer and Kumaraswami Sastri, JJ.*) 525

——S. 101—*Merger—Scope of the doctrine—Purchase of the equity of redemption by mortgagee—Absence of mesne incumbrances, effect of.*

T. P. Act—*Contd.* PAGE

A mortgaged his property to M who assigned his mortgage right to B's father in 1892. In 1897 B's father obtained a fresh mortgage from A for the amount due on the mortgage of 1892. On his father's death, B succeeded to his mortgage right In 1899 B purchased A's equity of redemption in the mortgaged property. In 1905 B sold the same property to A purporting to reserve his rights under the mortgages in favour of his father. Subsequently B instituted a suit on foot of the mortgages reserved in the conveyance of 1905.

Held, that the mortgages had become extinguished by B's purchase of the equity of redemption and that B could not sue upon them.

Per Wallis, C. J.:—Where there are no mesne incumbrances outstanding at the date of the purchase of the equity of redemption by the mortgagee there is merger under S. 100 of the Transfer of Property Act.

Per Seshagiri Iyer, J.—S. 101 of the Transfer of Property Act leaves untouched the general rule of law that when a mortgagee purchases the equity of redemption the encumbrance in his favour is extinguished. It only enacts that where there are other mortgages on the property an intention will be imputed to the mortgagee purchaser that the intended to keep alive his own mortgage as a protection against subsequent claimants. The mortgagee purchaser can use his prior mortgage only as a shield against mesne incumbrances and that also only in respect of properties covered by such incumbrances, but he cannot sue upon his mortgage. ... ...

Whiteley v. *Delaney* (1914) A. C. 132. *Bhawani Kunwar* v. *Muthuraprasad Singh* (1912) I. L. R. 40 C 89 *Laxman Ganesh* v. *Mathurabai* (1913) I. L.R. 38 B 369. *Syed Ibrahim Sahib* v. *Armugathayee* (1912) I. L. R. 38 M 18 referred to . ...

Arumugasundara Maharajah Pillay v. *Narasimha Iyer*. (*Wallis, C. J. and Seshagiri Aiyar, J*) 583

Trust, charitable—*Uralans*—*Execution*—*Document drawn for execution by all*—*Execution of document by the majority*—*Whether operative*—*Intention*—*Payment to one of several trustees*—*No authority to receive*—*Validity*—*Trusts Act, S. 42.*

The majority of a body of charitable trustees can legally bind the whole body. *Wilkinson* v. *Malin* (1832) 2 Tyrwhit 544 *In re Whiteley and Bishop of London* v. *Whiteley* (1910) 1 Ch. 600, and *Teranath* v. *Lakshmi* (1882) I. L. R. 6 M. 270 referred. ... ...

It is a question of intention in each case whether a document drawn up for execution by several persons was to be operative only if all should execute it, or otherwise. *Sivaswamy Chetti* v. *Sevugan Chetti* (1901) I. L. R. 25 M. 389 *Latch* v. *Wedlake* 11 A & E 959 referred. ...

Where there are several trustees payment to one of them who has no authority either actual or by estoppel to receive and give discharge is not a valid payment ... ...

"Any trustee or trustees" in S. 42 of the Trusts Act mean the trustee where there is only one and all the trustees where there are more ... ...

Ram Babu v. *Committee of Rameshar* (1899) 1 Bom. L. R. 667 dissented from. ... ...

Ullattil Kalathil Nethiri Menon v. *Mullapulli Gopalan Nair*. (*Spencer and Coutts Trotter, JJ*) 291

Trust—*Contd.* PAGE.

————Trustee—Removal—Grounds—Grant of long leases no ground—*See* Receiver 209

Trusts Act—S. 42—"Any trustee or trustees"—Meaning. *See* Trust, Charitable 291

————S.88—Applicability—Agent deriving advantage from his position—Principal's rights. *See* C. P. C—S. 11—*Res Judicata* .. 551

Vendor and purchaser—*Deficiency in extent sold—Suit for compensation—Maintainability—Execution of conveyance-Effect—Covenant for title—Nature and scope of.*

A covenant for title is not a covenant that the land purported to be conveyed is of the extent stated in the sale-deed but is a contract with the buyer that the interest which the seller professes to transfer to the buyer subsists and that he has power to transfer the same.

A suit by the purchaser of land for the recovery of compensation in respect of a deficiency in extent cannot therefore be based on the covenant for title but must be as for part failure of consideration. Such a claim can be made even after the execution of the conveyance.

In re Turner and Skelton (1880) 13 Ch. D. 131 followed.

Joliffe v. *Baker* (1883) 11 Q. B. D. 255 not followed.

Janga Venkata Reddy v. *Jamal Ahmed Sahib* (*Sadasiva Aiyar and Napier, JJ.*) 122

Vizagapatam Agency Rules—Attachment—Claim petition—Allowance of—Declaratory suit by unsuccessful decree-holder—Maintainablity. *See* Right of suit 780

Will—Construction—**Legacy**—*Bequest of six acres of good irrigated nanja land out of 19-40 acres in a village—Bequest, not void for uncertainly—Nature of the interest of legatee's heir—Construction so as to give effect to the legacy—English rules of construction.*

Where a testator bequeathed certain lands by the undermentioned clause *viz.*, "I give to my father's sister's second son. Murugesa Mudaliar ....6 acres of good irrigated nanja lands in the village of Pudur, etc.," and the testator had 19.40 acres of land answering to the description, and the legatee died without having selected 6 acres and his heir brought a suit against the executor for the 6 acres and mesne profits

Held, the bequest is not void for uncertainty. The legatee has a vested interest in 6 out of the 19-40 acres as a tenant-in-common along with the residuary legatee and is entitled to a partition by metes and bounds by court.

Per Wallis, C.J.—The English rule as to selection by the legatee is too artificial rule to be applied to a Hindu agriculturist. His intention would generally be that the lands should to be partitioned by the court in the absence of any agreement.

Per Srinivasa Aiyangar, J.—Courts should if possible construe the will so as to give effect to the legacy and ought not to hold a will void for uncertainty unless it is utterly impossible to put a meaning on it.

Bharadwaja Mudaliar v *Kolandavelu Mudaliar* (*Wallis, C. J. and Srinivasa Aiyangar, J.*) 717

Will—*Contd.* PAGE.

——**Dependent relative revocation**—*Inconsistent disposition ineffectual or invalid—No revocation—Disposition of property and authority to adopt—Inconsistent later disposition—Not revocation of authority to adopt.*

If by his will a testator gives property to A and by a codicil gives the same property to B and if in the event, it turns out that B cannot take it, it has to be ascertained from the language of the testator as found in his testamentary documents whether he intended the gift to A should be displaced altogether or that it should be displaced only in favour of B, and if B cannot take, the gift to A should remain.

An alternative inconsistent disposition which is not valid or effectual in itself does not revoke an earlier disposition of the same property.

Held, where a Hindu testator who at the time was competent to dispose of the property by a will, disposed of his property and also gave his wife authority to make an adoption in the event of the son then proposed to be adopted dying and by a subsequent will but at a time when by reason of the adoption that had been made he was incompetent to make any disposition of the property directed a different disposition of the property without any reference to the power to adopt given in the earlier will.

Held that the later will had not the effect of revoking the authority to adopt given by the earlier will. *Alexander* v. *Kirkpatrick* (1874) L. R. 2 H. L. Sc. 397.

Venkatanarayana Pillai v. *Subbammal.* (*P.C.*) ... 851

——**Non-production of Will**—*Presumption of revocation—Secondary evidence—Not properly admitted in lower court—Objection taken for the first time in appellate court—Withdrawal from proceedings to set aside arbitrator's award—Some of the legatees disclaiming benefit of new will—Other legatees not entitled to their shares.*

In view of the habits and conditions of the people of India, the rule of English Law, *viz.*, that when a will is traced to the possession of the deceased and is not forthcoming at his death, the presumption is that he has destroyed it, must be applied with considerable caution.

In a case where the testator was a very old man at the time of his death and was almost imbecile and there was nothing definite to show that he had any motive to destroy the will, or was mentally competent to do so, on the other hand, the circumstances were in favour of the view that the will was mislaid or stolen. *Held*, that it was within the competence of the lower court to come to the conclusion that the will was not revoked.

Where the registration copy of a will was admitted in evidence without objection in the first court *Held*, that objection to its admissibility on the ground that no sufficient foundation was laid for secondary evidence could not be entertained in appeal for the first time.

Held, further, that the withdrawal of a revision petition filed by one of the co-sharers did not preclude him from claiming his full share when the arbitration proceedings sought to be set aside by him were, as a matter of fact, set aside on the revision petition of the other sharers

Where a testator divided his estate equally among his eight sons but subsequently revoked the will disinheriting two of them but some of the legatees chose to abide by the terms of the earlier will.

Will—*Contd.* PAGE.

Held, that the plaintiffs who were the other legatees were not entitled to recover their shares also

Padman v. *Hanwanta*, (*Mr. Ameer Ali*) (*P. C.*) 307

————**Residuary clause**—*Construction—English Rules of—Inapplicability—Fund existence of which unknown to testator—Intestacy in respect of—Release under mutural mistake as to—Effect of.*

The residuary clause in the form in which it appears in English wills is practically unknown to the ordinary testator in Madras and the rules which are laid down by English Courts as to the construction of those clauses are therefore not applicable here.

Where under a will dated 5—12—1905, the testator after stating the properties which he intended to dispose of and after making certain disposition, in para 13 provided that " the sum which may be left after deducting the abovementioned legacies and such other expense shall be utilised in my name for a pooja," etc., but at the time of other will, there was a fund in court to the credit of the testator unknown to him.

Held, that Cl. 13 did not apply to this amount and it went to the heirs as on an intestacy.

Held, also that a release by the natural heir of all his claims against the estate before the mistake was discovered could not affect his rights to the money.

Kunthalammal v. *Suryaprapasaroya Mudaliar*. (*Bakewell, J*). ... 682

Witness—Cross-examination—Contradicting or discounting evidence—Use of evidence in former case—Legitimacy—Conditions. *See* Hindu Law—Adoption ... ...

Words—"Judgment"—Meaning. *See* Letters Patent (Madras)—Cl. 15.

————"Pesides poramboke" in Inam title—Deed—Meaning. *See* Madras Forest Act—Ss. 6,16 276

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